BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. COLTON JOINT UNIFIED SCHOOL DISTRICT,	OAH Case No. 2017060750
COLTON JOINT UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017081086 ORDER FOLLOWING PREHEARING CONFERENCE AND ORDER DENYING MOTION TO BIFURCATE ISSUES

On October 2, 2017, Administrative Law Judge Chris Butchko, Office of Administrative Hearings, held a telephonic prehearing conference. Alexis Casillas, attorney at law, appeared on Student's behalf. Deborah Cesario and Stephanie Baril, attorneys at law, appeared on behalf of Colton Joint Unified School District. The PHC was recorded. Based upon discussion with the parties, the ALJ makes the following orders.

1. Motion to Bifurcate Issues. On September 27, 2017, District filed a motion to bifurcate the due process hearing. The motion renewed an earlier request filed on August 30, 2017, which was denied without prejudice by order dated September 22, 2017. The order stated that the motion should be renewed so that it could be resolved at the prehearing conference. Because the time for Student to respond to the motion had not yet run, the ALJ received argument on the motion but reserved ruling until Student's time to file a written opposition had run. Student responded on October 2, 2017.

In its motion, District notes that Student has raised claims that are facially outside the two year limitations period for Individuals with Disabilities Education Act claims applicable in the state of California. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) Student filed the complaint on June 15, 2017, so the statute of limitations would bar all claims involving events prior to June 15, 2015. Student includes claims asserting that District should have convened an IEP meeting after Student's third birthday on August 2,

2013, and asserting that the IEP developed at the February 9, 2015 IEP team meeting was inappropriate and incomplete.

District notes that there are circumstances under which the two-year limitations period may be tolled. First, the time to file does not begin to run until the date on which Parents knew or should have known of the facts forming the basis of Student's claims. (Ed. Code § 56505, subd. (l); 20 U.S.C. § 1415(f)(3)(D).) Further, the limitations period can be tolled if the school district withheld necessary information from parent or misrepresented relevant facts to parent. District notes that Student's claims asserting District's failure to conduct an IEP team meeting for the 2013-2014 school year and those stemming from Parents' October 27, 2014 referral request and the subsequent February 9, 2015, IEP team meeting would be barred unless covered by a tolling exception. On that basis, District asserts that it would be efficient to bifurcate the issues of when Parents were aware of the facts underlying these claims and whether District inhibited their ability to discover those facts from the remainder of the hearing. Doing so, District argues, could potentially cut those claims out of the hearing if no exception were to apply.

The federal and state law pertaining to special education due process administrative proceedings does not contain a specific reference to the procedure for bifurcating issues for hearing. Such authority resides in the discretion of the administrative law judge, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

Student opposes bifurcation on several grounds. First, bifurcation will cause delay. Student's case has been pending since June 2017. If a hearing on bifurcation is held, further proceedings will be put off until after the hearing, briefing by the parties, issuance of a decision, and a further prehearing conference to set dates for the remainder of the hearing. Such delay could be substantial, even if all parties and witnesses were immediately available for the resumed hearing. In addition, the bifurcation hearing would be complex and difficult to manage. Once Parents have presented prima facie evidence that they lacked sufficient knowledge to file, District would rebut. Parents have stated that they would then put on evidence of misrepresentations or concealment by District in response, to which District would surely react. Student asserts that the bifurcation hearing would be complex and cumbersome. Lastly, Student notes that his expert witness has a narrow window of availability of October 11 and 12, 2017, which would require her testimony to be taken in the midst of the bifurcation hearing or postponed indefinitely.

Bifurcation holds out the possibility of economy, but it may be illusory. Time will be saved in this hearing only if it is found that the claims are barred. If tolling applies, the time taken up will be substantially wasted, as the witnesses at that hearing will need to be recalled at the main hearing. Evidence which would be presented at the bifurcation hearing relates to claims in the main hearing and would likely be received as background material to frame the issues. In addition, the bifurcation hearing would require careful management, as the issues are neither simple nor isolated. This is not an action where the issues for which bifurcation is

being considered can cleanly excised from the hearing issues. Under such circumstances, bifurcation is not sufficiently likely to serve the end of judicial economy.

In part, this conclusion rests upon Student's assertion in his briefing that he is essentially seeking tolling for 127 days (Opposition at pg. 12). That would roll back the limitations period to approximately February 9, 2015, the date of Student's initial IEP team meeting. In light of that statement, bifurcation becomes untenable. Although the IEP team meeting and Student's initial speech services will be at issue, they would be material to some extent to consideration of the later issues within the two year statute of limitation period. Student did not begin attending school in District until July 30, 2015, within the limitations period, so District is not likely to need extensive testimony from staff for the time period at issue. Any impact on the parties, witnesses, or OAH resources due to hearing evidence relating to claims which may be time-barred is likely to be minimal and does not justify bifurcation.

Further, the timeline Student included with his Opposition begins with events on October 27, 2014, presumably presented for background to his assertion that his claims begin with the February 9, 2015, IEP team meeting. At that time, District responded to Parents' request for assessment. Given that the date frame for the beginning of the interaction of the parties, it appears clear that no misrepresentation or omission could have occurred before then. Accordingly, Issue 1 in Student's Amended Complaint, asserting that District denied Student a free, appropriate public education by not holding an IEP team meeting in the 2013-2014 school year is DISMISSED as outside the limitations period and not argued to be covered by any tolling provision.[1] The remaining claims will be considered at hearing as set forth in Section 3, below.

The request to bifurcate the hearing is DENIED.

2. Hearing Dates, Times, and Location. The hearing shall take place on October 10, 11, 12, 17, 18, and 19, 2017, at 9:30 AM the first day, and 9:00 AM each hearing day thereafter, continuing day to day, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall take place at District's offices located at 10435 Cedar Avenue, Bloomington, CA 92316.

As ordered in the scheduling order, the named local educational agency shall 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

[1] Student's Complaint asserts that the February 9, 2015 IEP team meeting report "suggests" that Student did not have an IEP team meeting and was not found eligible for services in August of 2013 at age 3 because "school was on official break more than five days." (DPHR pg. 13) This assertion is incomprehensible and is not repeated or cited in Student's Opposition.

facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

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.

3. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are discussed below. They have been revised from those initially presented at the PHC following discussions with the parties and further review of the First Amended Complaint.

Student's Issues for hearing are as follows:

Issue 1: Did District commit procedural violations which denied Student a free appropriate public education during the 2014-2015 school year by:

a. Failing to conduct a full and complete psychoeducational assessment in response to the family's October 27, 2014 referral;

b. Failing to convene an individualized education program team meeting within legal time-frames provided for in California Education Code, section 56043, after the family's October 27, 2014 referral; or

c. Failing to convene a procedurally appropriate IEP team meeting, or to consider all suspected areas of disability at the February 9, 2015 IEP team meeting?

Issue 2: Did District commit procedural violations that denied Student a FAPE during the 2015-2016 school year by failing to:

a. Develop an assessment plan within fifteen days of the family's August 21, 2015 referral;

b. Convene an IEP meeting to review assessments within legal time-frames provided for in California Education Code, section 56043, after the family's August 21, 2015 referral;

c. Report progress on goals at the November 13, 2015 IEP meeting;

d. Identify and offer all services in met eligibility categories at the November 13, 2015 IEP meeting;

e. Offer goals in all areas of need at the February 9, 2016 IEP team meeting;

f. Appropriately respond to the family's request for independent educational evaluations in the areas of occupational therapy, speech, and behavior; or

g. Respond to Parents' March 9, 2016 educational records request within five days?

Issue 3: Did District's offer of services at the February 9, 2015 IEP team meeting deny Student a FAPE because:

a. The offer of speech and language services were insufficient;

b. No other services were offered; or

c. District failed to provide an appropriate placement?

Issue 4: Did District commit procedural violations that which denied Student a FAPE during the 2016-2017 school year by:

a. Failing to timely convene an IEP meeting in response to the family's September 7, 2016, September 23, 2016, and November 13, 2016 requests;

b. Failing to convene an IEP in response to the November 18, 2016 findings of severe and pervasive bullying;

c. Failing to track progress or report grades during the 2016-2017 school year;

d. Failing to offer goals in all areas of need at the April 17, 2017 IEP meeting;

e. Refusing to answer the family's questions about how many students had IEPs in Student's classroom and thereby preventing them from evaluating and understanding his representations about what had been and would be done in the classroom; or

f. Predetermining that no aide would be offered in response to the family's outstanding request?

Issue 5: Did District's offer of services in the November 13, 2015 IEP deny Student a FAPE by:

a. Failing to find Student qualified for special education services due to specific learning disability;

b. Offering insufficient speech and language services and specialized academic instruction to meet Student's needs; or

c. Failing to offer other required services to meet Student's needs?

Issue 6: Did District's offers of FAPE made at the February 5, 2016, and March 9, 2016 IEP team meetings deny Student a FAPE because:

a. District's offers of speech and language services, individual and group counseling, and specialized academic instruction were insufficient;

b. District did not assess or offer Student other needed services, such as occupational therapy or behavioral intervention; or

c. District did not address Student's claims of continued bullying?

Issue 7: Did District's offer of FAPE at the April 17, 2017 IEP team meeting deny Student a FAPE because:

a. District's offers of speech and language services, individual and group counseling, and specialized academic instruction were insufficient;

b. District failed to incorporate the recommendations made in the independent educational evaluations;

c. District did not offer Student other needed services, such as occupational therapy or behavioral intervention;

d. District did not offer to provide Student with a one-to-one aide; or

e. District did not address Student's claims of continued bullying?

Student's Proposed Resolutions:

1. Training of District employees in the areas of child-find obligations, minimal assessment requirements, assessment timelines, and other special education related requirements.

2. Order directing correction of and training in the independent educational evaluation required timelines and processes.
3. New independent educational evaluations in the area of speech and language therapy, behavior, psychoeducational functioning.
4. Compensatory services and academic tutoring.

District's Issues for hearing are as follows:

Issue 1: Did District offer Student a free appropriate public education, in the least restrictive environment, in Student's April 17, 2017 annual IEP?

District's Proposed Resolutions:

1. A determination that the April 17, 2017 IEP offers Student a FAPE in the least restrictive environment.
2. An order stating that District may implement Student's April 17, 2017 annual IEP without parental consent.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Except as permitted in this order or otherwise ordered by the ALJ, 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, identifying the exhibit number and page, or the entire binder shall be consecutively numbered (excluding tabs and cover pages). Each binder shall have a detailed table of contents, including the exhibit number, date of document, title, and tab number. Documents should be organized in chronological order beginning with the earliest dated documents.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Emails may be consolidated into one exhibit if they are part of a single chain of messages. Documents offered as evidence to support a request for reimbursement must be separated by vendor and should be internally chronological where possible.

Excerpts of an audio record of an individualized education program team meeting, if any, should be transcribed and offered as documentary evidence in addition to the audio recording; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter. 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).

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 shall 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 exchange resumes, and provide a copy for the exhibit binders, for each witness who is expected to testify as to their professional experience and credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

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), District shall serve a copy of the school calendar(s) and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ not later than the first day of hearing.

The parties shall meet and confer by noon on October 9, 2017, to discuss exhibits, delete duplicate exhibits from the exhibit binders and to consolidate exhibits where possible. The parties are not required to renumber exhibits if exhibits are removed from their binders.

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.

5. 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.

The parties are ordered to meet and confer before the close of business on October 9, 2017, to discuss the schedule of witnesses. On each day of hearing, the parties shall provide the ALJ with a joint witness schedule for that day which shall include a reasonable estimate of time for each side's direct and cross examination. The District shall have witnesses available if an 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.

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.

6. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

7. 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; shall arrange for the testimony to be taken in a private location with no other persons present; 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.

At the time of the prehearing conference, neither party requested that a witness testify telephonically. Both parties requested to reserve and were granted the right to move to have expert witnesses appear telephonically.

8. Electronic Recording of Hearing.

a. Audio Recording. Student requested permission to record the hearing. Student's request is granted, subject to the following conditions and restrictions: 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) the recording shall not be played or published for a prospective witness; 5) the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) the parties shall erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and 7) the parties shall not use this recording in any subsequent due process hearing. Permission is granted to District to record proceedings on the same conditions and restrictions.

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.

9. 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, Student is the first petitioning party as to his issues, and has the burden of proof on his issues. Accordingly, Student shall present its case-in-chief, followed by District. Then, District shall present its case-in-chief regarding its sole issue for hearing. District has the burden of proof on its issue.

10. Motions. No further motions were pending or contemplated by the parties. 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.

11. 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.

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

13. 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.

14. 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.

15. Hearing Closed To the Public. The hearing will be closed to the public.

16. 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 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.

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

IT IS SO ORDERED.

DATE: October 5, 2017

DocuSigned by:
Peter Paul Castillo for
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CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings