BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: BONSALL UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT,	OAH Case No. 2016080681
PARENT ON BEHALF OF STUDENT, v. BONSALL UNIFIED SCHOOL DISTRICT.	OAH Case No. 2016070664 ORDER FOLLOWING PREHEARING CONFERENCE OF JANUARY 18, 2017

On January 18, 2017, a telephonic prehearing conference was held before Administrative Law Judge Darrell Lepkowsky, Office of Administrative Hearings. Deborah Cesario, Attorney at Law, appeared on behalf of Bonsall Unified School District. Cara Lucier, Attorney at Law, appeared on behalf of Student. Student's mother was also present. The ALJ recorded the PHC.

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, 25, 26, 30, and 31, and on February 1, 2, 7, 8, 9, and 10, 2017**, and continuing day to day, Monday through Thursday, as needed at the discretion of the Administrative Law Judge. The hearing shall start at 9:30 a.m. on January 24 and February 7, 2017, at 1:30 p.m. on January 30, 2017, and at 9:00 a.m. all other days, unless otherwise ordered. The hearing shall take place at the **Community Building located in front of District's offices, at 31505 Old River Road, Bonsall, California 92003**.

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

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.

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

Student's issues at the due process hearing are as follows:

(1) Did District deny Student a free appropriate public education for the 2014-2015 school year and extended school year, by:

(a) Inappropriately placing Student in a general education classroom without sufficient supports to address Student's mood disorder, anxiety, attention deficit hyperactivity disorder, pervasive developmental disorder and possible schizophrenia or her academic needs;

(b) Changing Student's placement outside of the IEP process;

(c) Failing to offer and provide appropriate behavioral supports to address Student's behaviors;

(d) Failing to offer and provide related services, such as specialized academic instruction for writing, intensive counseling, and occupational therapy to address self-regulation techniques, writing and keyboarding;

(e) Not offering extended school year service for summer of 2015; and/or

(f) Not including a general education teacher at the IEP team meeting of October 9, 2014, which was a procedural violation that caused a denial of FAPE?

(2) Did District deny Student a FAPE for the 2015-2016 school year and extended school year, by:

(a) Inappropriately offering Student a general education classroom placement for 95 percent of her school time, when Student required more intensive placement to support her social, emotional, behavioral, and academic needs;

(b) Failing to offer and provide appropriate goals in all areas of need, including writing, reading comprehension, and task completion;

(c) Not making a specific, written offer of FAPE at the June 2, 2015 IEP team meeting;

(d) Failing to offer and provide behavioral supports to address Student's behaviors, causing her to miss instruction and not benefit academically; and/or

(e) Failing to implement the designated general education time, behavior strategies, and the behavior intervention plan, as specified in Student's IEP?

(3) Did District deny Student a FAPE for the 2015-2016 school year by failing to provide a complete set of Student's educational records within five business days of Parents' request on May 10, 2016, which denied Parents the ability to participate in her IEP process and effectively monitor and enforce the IEP since that date?

(4) Did District deny Student a FAPE for the 2016-2017 school year and extended school year by failing to offer Student an appropriate placement at the IEP team meetings of May 17, 2016, and June 2, 2016, which addressed her behavioral, social, sensory, mental health, and academic needs?

Student proposes the following remedies:

(1) A finding that District denied Student a FAPE from July 2014 to the present.

(2) Reimbursement for tuition, transportation, and the independent assessments conducted by Dr. Jill Weckerly.

(3) District must provide a full copy of Student' educational records and train District staff as to its legal obligations in maintaining and producing student records.

District's issues at the due process hearing are as follows:

(1) Does the June 2016 annual IEP offer Student a FAPE in the least restrictive environment?

(2) May District implement Student's June 2016 annual IEP without Parents' consent?

District proposes the following remedies:

(1) A finding that District offered Student a FAPE in the least restrictive environment in the June 2016 IEP.

(2) An order allowing District to implement Student's June 2016 IEP without Parents' consent.

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 shall be separately identified, with a tabbed divider. Each exhibit binder shall contain a detailed table of contents. The parties have indicated they have already exchanged exhibits in compliance with Education Code section 56505, subdivision (e)(7).

If District's exhibits do not already include its school calendar for all school years that are related to the issues herein, District shall add the calendar to its exhibits on order of the ALJ.

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 5:00 p.m. on **January 20, 2017**, to attempt to reach agreement on an hour-by-hour witness schedule for the first day of hearing. Further, District will notify Student of any witnesses listed in Student' prehearing conference statement who are no longer employed by District. 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. District 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.

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 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. Unless otherwise ordered, only one round of redirect and/or re-cross examination shall be permitted.

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. The parties did not request permission for a witness to telephonically testify.

7. Electronic Recording of Hearing.

a. Audio Recording. The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

The parties' motions to make an audio recording of the hearing are granted. Student's counsel and District's counsel shall be permitted to make an audio recording 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 recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; 6) 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; 7) the parties shall not use the recording in any subsequent due process hearing or other proceeding; 8) No more than one person for each party may record the hearing; and 9) the parties shall destroy the unofficial recording when the decision in this case becomes final and/or when all appeals have been exhausted.

Any recording made by counsel is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ.

b. Video Recording/Photography. No party, witness or anyone else present may make any video recording or take any photographs 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, while both parties have filed for due process, Student filed her case first and her case encompasses a longer period of time than does District's case. Accordingly, Student shall present her case-in-chief, followed by District.

9. Motions.

a. District's Motion to Amend. On January 17, 2017, District filed a motion to amend its complaint to add an allegation that it be permitted to assess Student over the lack of parental consent. Student filed an opposition to the motion on January 18, 2017, contending that the motion to amend was moot as Student's parent had signed consent to the

assessment plan. Based on parent giving consent to the assessments, the ALJ denied District's motion to amend as moot.

b. District's Motion to Compel Observation. District filed a renewed motion to compel an observation by its expert Dr. Cathleen Geraghty-Jenkinson, contending that Student's non-public school, Arch Academy has not permitted the observation. Arch has denied the observation because District already had four people come to the school to observe Student. Student represented that it has attempted to convince Arch to permit additional observations, but that Arch is denying either party additional observation time because it feels the observations disrupt instruction.

As previously referenced by OAH in its Order Granting District's Motion to Observe Student, dated October 21, 2016, school districts have a right to have their experts observe a student at her private placement as part of an expert's preparation for a due process hearing. (*Benjamin G. v. Special Education Hearing Office* (2005) 131 Cal. App. 4th 875, 884) District contended that it was not initially aware of the need for Dr. Geraghty to observe Student and therefore did not request the observation until after its other staff had observed Student at Arch.

District has demonstrated good cause for the observation and its motion is granted. However, Student is correct that OAH does not have jurisdiction over Arch as it is not a party to this case. Student is directed to inform Arch that OAH has granted the motion to compel and to request that the observation be permitted. If Arch continues to decline to permit the observation, there will be no way to compel it to so.

c. District's Motion to Bifurcate the Proceedings. District made an oral motion to bifurcate its issue for hearing in OAH case number 2016080681, from Student's case in OAH case number 2016070664, until after it had an opportunity to assess Student pursuant to the recently signed assessment plan. District contended that it would be prejudiced by a failure to have the additional information concerning Student's needs. Student opposed the motion to bifurcate.

Federal and state laws pertaining to special education due process administrative proceedings do not contain a specific reference to the procedure for bifurcating issues at trial. 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).)

Here, District has failed to present good cause for bifurcation of the proceedings. District has failed to present a persuasive argument that it requires newly-obtained information about Student to support its argument that its June 2016 IEP offer, made over six months ago, constituted a FAPE. District's motion to bifurcate is denied.

d. Student's Motion to Strike Witnesses. District's witness list, attached to its Prehearing Conference Statement, contains reference to two witnesses who are not

identified by name. District maintained that it failed to identify the witnesses by name for protection of the witnesses. District did not identify the two witnesses by name in any communication with Student filed within the five days mandated by Education Code section 56505, subdivision (e)(7).

Student's motion to strike the two unidentified witnesses is granted. District's failure to identify the witnesses violates the mandate of Education Code section 56505, subdivision (e)(7). There is no provision for maintaining secret the identity of witnesses testifying at a due process hearing.

e. Parties' Motion to Audio Record the proceedings. The motion is granted pursuant to the parameters stated in paragraph 7(a) above.

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 PHC of January 18, 2017.

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 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 mediation or 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: http://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

Neither party requested accommodations because of an attendee's anticipated special needs. If any need for accommodation arises, the party shall immediately notify OAH.

14. Hearing Opened To the Public. At the request of Student, the hearing will be opened to the public. District shall arrange seating at the back of the hearing room. All witnesses, other than the parties or their representatives, shall be sequestered and shall not be permitted in the hearing room prior to their testimony. The parties shall ensure that their witnesses are aware of this and that the witnesses do not attend the hearing prior to the time they testify. Once they have testified, the witness may attend the hearing.

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.

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

IT IS SO ORDERED.

DATE: January 19, 2017

DocuSigned by:
Darrell Lepkowsky
A228F8201132499...

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings