BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENTS ON BEHALF OF STUDENT, v. NEWPORT-MESA UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2012050785 ORDER FOLLOWING PRE-HEARING CONFERENCE OF OCTOBER 11, 2013

On October 11, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings (OAH). Kathleen M. Loyer, Attorney at Law, appeared on behalf of Parents on behalf of Student (Student). Alefia Mithaiwala, Attorney at Law, appeared on behalf of the Newport-Mesa Unified School District (District). The ALJ recorded the PHC.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on October 15, 16, 17, 22, 23, and 24, 2013, at the District's **Harper Assessment Center, located at 425 East 18th Street, Bldg. E-2, Costa Mesa, CA 92627.** The hearing shall begin at 9:30 a.m. on October 15 and 22, 2013, and at 9:00 a.m. all other days, unless otherwise ordered. Student's request to end the hearing at approximately 2:30 p.m. on Oct 22, 2013, is granted. The District's request to end the hearing at approximately 2:30 p.m. on October 17, 2013, is also granted.

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 legal representative; 2) a table for the District's legal representative and the District's representative; 3) a table for the witness; and 4) a table for the ALJ, near an electrical outlet. The District shall provide drinking water to all parties, witnesses and the ALJ. The water does not have to be bottled. 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.

The District shall also ensure that a separate and private room is available near the hearing room, for Student and his representatives during recess and breaks.

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.) Since May 16, 2010, did the District deprive Student of a free appropriate public education (FAPE) when it failed to appropriately assess Student in all areas of suspected disability, specifically in the areas of cognitive ability, functional communications, assistive technology, and social integration and behavioral analysis?

(B) Did the District fail to provide Student a FAPE at the Individualized Education Program (IEP) meetings of May 21, 2010; June 21, 2010; November 21, 2010; January 10, 2011; and February 29, 2012 by:

1. Failing to address all of Student's unique needs;

2. Failing to adopt appropriate goals; and

3. Failing to provide appropriate placement and services in the areas of behavioral support, speech and language, parental training, occupational therapy, and assistive technology?

(C) Since May 16, 2010, did the District deprive Student of a FAPE when it failed to have "highly qualified" staff to assess and provide services to Student in the areas of behavior intervention, inclusion, assistive technology, and individual aide support?

(D) Did the District fail to conduct an appropriate Functional Behavior Analysis (FBA) and Sensory Diet Development Evaluation in May 2013 to determine Student's need for aide assistance, which resulted in the IEP team adopting a less than adequate Behavior Support Plan, Behavior Intervention Plan, and inappropriate aide support?

Student's proposed resolutions are: (1) Independent Education Evaluations (IEE) in the areas of academics, cognition, social/emotion, speech and language, functional communications, and assistive technology; (2) compensatory education in the areas of speech and language, assistive technology, Applied Behavior Analysis, and FBA;; and (3) reimbursement to Student's parents for any costs incurred in obtaining private assessments and/or services.

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 parties represent that they have served 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.

The parties are directed to meet and confer as to exhibits to ensure that there are no duplicate exhibits.

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 good cause, 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.

The parties have each listed more than twenty witnesses. The parties are directed 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 will meet prior to the first day of hearing and prepare revised witness lists indicating the actual witnesses who will testify at the hearing and the date and time the witness will be testifying.

The District shall have witnesses available who are present District employees, 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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. If a witness is listed by both parties that witness shall only testify once. Only one round of re-direct and/or re-cross examination will be permitted, unless otherwise ordered.

6. Telephonic Testimony. Student has moved to take the testimony of witness Cynthia Cottier by telephone based upon the fact that she is coming from another county, her testimony is anticipated to be very brief, and based upon conflicts in Ms. Cottier's schedule. The District objected to the 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.

Generally speaking, conflicts in a witness's schedule alone would not be good cause for permitting telephonic testimony of an otherwise available witness. However, given the traffic concerns with the distance Ms. Cottier has to travel to the hearing and the short duration Student represents that Ms. Cottier will testify, Student's motion is granted pursuant to the directives in the above paragraph. Student shall provide Ms. Cottier with copies of both parties' exhibit binders, unless the parties reach a mutual stipulation to narrow the scope of documents to be provided to her.

7. Motions.

District's Objection to Late Evidence Submitted by Student

Prior to this prehearing conference, the District filed an objection to evidence it received from Student less than five days prior to the hearing. Student filed a response to the District's objection and the District filed a reply to Student's response. The ALJ heard further oral argument at the PHC. Based upon the fact that Student had provided the District previously with all documents other than receipts Student wishes to move into evidence, the ALJ overruled the District's objection. The ALJ offered to postpone the hearing a few days to compensate for the District not having sufficient time to review the evidence. The District declined the offer and indicated that it was prepared to proceed to hearing as scheduled.

Request to Record Hearing

Student's request to record the hearing is granted subject to the following conditions: Only audio recordings are permitted. No video or other visual recording by any method is permitted under this order. Each party may record all or any part of the hearing itself, while the ALJ presiding at the hearing is on the record, so long as the recording devise is silent and unobtrusive. The ALJ will not stop the proceedings in order for the parties to change tapes, discs, or otherwise adjust their recording devices. Every time the ALJ goes off the record for any purpose, each party shall turn off its recording device. The parties shall not record any portions of any conversations of any party or witness or anyone present in the hearing room while the hearing is not in session and on the record. The OAH recording of the hearing is the official record and the parties may not rely on or cite to their personal recordings for any purpose related to the hearing, such as closing argument. The parties may not use their recordings for other than their own use, or use by their representatives.

Other Motions

No other motions are pending or contemplated. Any other prehearing motion 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 September 30, 2013.

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

9. 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.

10. Special Needs and Accommodations. Student's parent will require a Brazilian Portuguese translator.

11. Compensatory Education/Reimbursement. If Student is seeking reimbursement of expenditures he must present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. Student must also present evidence of any other remedy he is seeking, including compensatory education, with regard to the type, amount, duration, need and appropriateness of any remedy requested.

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

13. 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 SIMULATANEOUSLY 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.

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

IT IS SO ORDERED.

Dated: October 11, 2013

/s/
DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings