

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012101030

ORDER FOLLOWING PRE-HEARING
CONFERENCE

On February 20, 2013, a recorded, telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Robert G. Martin, Office of Administrative Hearings (OAH). Attorneys Jodi Bynder and Eric Menyuk represented Student. Attorney Patrick Balucan represented the Los Angeles Unified School District (LAUSD).

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

1. Request for Leave to Amend Due Process Hearing Request. At the PHC, Student requested leave to amend Student's Due Process Hearing Request to add the allegation that District had denied Student a free appropriate public education (FAPE) by failing to conduct an October 2012 individualized education program meeting (IEP), despite having changed Student's annual IEP date to October in 2011. An amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).) It may be filed when: (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session; or (b) the hearing officer grants permission, provided that the hearing officer may only grant such permission at any time not later than five days before the due process hearing. (20 U.S.C. §1415(c)(2)(E)(i).) Because the District has not consented to the amendment, and the hearing officer declines to grant leave to amend this close to the hearing date where the basis for the amendment has been evident for months, the request is denied. The parties indicated that they would explore the possibility of Student filing an amended complaint accompanied by written District consent.

2. Hearing Dates, Times, and Location. The hearing shall take place on February 25-28, 2013, beginning at 1:30 p.m. on February 25, and at 9:30 a.m. each day thereafter. The hearing shall take place at the Office of Administrative Hearings, 15350 Sherman Way, Suite 300, Van Nuys, CA 91406.

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.

1. Issues. The issues at the due process hearing are those alleged in the due process complaint, as limited by Student in Student's Pre-Hearing Conference Statement and clarified by the parties and the ALJ at the PHC:

- a. Whether the District's February 14, 2011 IEP and October 24, 2011 IEP each denied Student a FAPE by:
 - i. Offering pre-determined placement and services
 - ii. Failing to consider a letter from Student's therapist provided by Parent
 - iii. Failing to include an accurate description of Student's present levels of performance
 - iv. Failing to include appropriate measurable annual goals designed to address the full range and extent of student's challenges
 - v. Offering placement at Chatsworth High School
 - vi. Failing to provide appropriate types and amounts of counseling services.
 - vii. Failing to offer adaptive physical education
 - viii. Failing to consider application of Education Code sections 51241, subdivision (c)(1) and 51228, subdivision (d) as options for Student to meet her physical education requirements.
- b. Whether the District denied Student a FAPE by failing to hold an annual IEP in February 2012.

2. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and District shall mark its exhibits using the numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties represented that they have previously exchanged exhibit binders prepared pursuant to these instructions. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make an original and three copies of its exhibits to exchange and to use at the hearing). 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.

3. 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 by February 22, 2013, regarding the schedule of witnesses. The parties shall 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 shall discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

4. 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.

5. Telephonic Testimony. Student represented that Student wishes to present telephonic testimony from six percipient witnesses: Lynn Papaconstantinou and Jude Wood, who reside in La Jolla, California; Tom Britton and Anne Jones, who reside in North Carolina; Paige Corley, who resides in Utah, and Micaela Gruber, who resides in Malibu, California. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Leave is granted for witnesses Papaconstantinou, Wood, Britton, Jones and Corley to appear by telephone. Leave is denied for witness Gruber to appear by telephone, because Ms. Gruber resides within 40 driving miles of the hearing location and cannot reasonably be considered to be unavailable to appear in person. Student shall provide each telephonic witness a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing. No witness will be heard by telephone unless this requirement has been fulfilled.

6. Timely Disclosure of Witnesses/Exhibits. The parties represented that they have exchanged their witness lists and exhibits pursuant to Education Code section 56505,

subdivision (e)(7), which requires disclosure of witnesses and exhibits at least five business days prior to the hearing.

7. Motions. As discussed above, Student may move to amend Student's Request for Due Process Hearing. The parties did not anticipate bringing any other motions. In the event that any other motion is brought after this date, it 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.

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. 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. Special Needs and Accommodations. Student requested a number of accommodations for the hearing. Student's requests for the use of a small private room, a telephone, copier and facsimile access "as necessary," and wireless access are denied. Student's request that OAH provide a speaker phone for telephonic witnesses is granted. Student's request to make an audio recording of the hearing is granted; provided, however, that the recording made by the ALJ shall be the sole official recording of the hearing for any and all purposes and that Student may only record during times when the ALJ announces "on the record."

Each party represented that no other special accommodation is required for any witness or party.

12. Hearing Closed To the Public.

13. Settlement. The parties are encouraged to continue working together to complete 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. 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 AND SHALL 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. 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: February 20, 2013

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings