

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

IRVINE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013070499

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 25, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Judith L. Pasewark, Office of Administrative Hearings (OAH). Tracy Petznick Johnson, Attorney at Law, appeared on behalf of Irvine Unified School District (District). Amanda Selogie and Jennifer Guze Campbell, Attorneys at Law, appeared on behalf of Parents on behalf of Student (Student). The PHC was recorded by Student pursuant to the agreement of the parties.¹

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

1. Hearing Dates, Times, and Location. The hearing shall take place on December 2, 3, 4, and 5, 2013, at the District's offices located at 5050 Barranca Parkway, Irvine, CA 92602. The hearing shall begin at 1:30 p.m. the first day of the hearing and at 9:30 a.m. all other days unless otherwise ordered.

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 District's sole issue at the due process hearing is whether the District's April 2013 Multidisciplinary Assessment and Assessment Report is appropriate. The District is requesting a finding that the Assessment and Assessment Report are appropriate and therefore Student is not entitled to an Independent Educational Evaluation (IEE) at public expense.

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

¹ The ALJ's recording equipment failed to properly record.

exhibit (for example, “S-5, S-6, or D-1, D-2”). Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). Further, Student shall immediately FAX or email to the District’s attorney a copy of Student’s Prehearing Conference Statement, Exhibit List and Witness List. 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. In the event of duplicate exhibits, the most legible version will be used.

After review of Student’s Exhibit List and discussion with the parties, the ALJ is excluding the Student’s Exhibits S11, S13, S17, S18, S19, S20, S21, and S22, as they are beyond the scope of the District’s sole issue regarding the April 2013 assessments. Said exhibits may be used solely for rebuttal of relevant testimony attained during hearing. Additionally, Student’s Exhibits S7 and S8 shall be subject to an offer of proof from Student, prior to referencing either exhibit at hearing. 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.

The parties are ordered to meet and confer by November 27, 2013, to schedule the 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 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.

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.

6. Telephonic Testimony. Neither party has requested 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. Student shall be allowed to provide telephonic testimony of Dr. Christine Majors, in the event he elects to do so.

7. Motions. Several motions were made during the PHC:

a. Student filed his own request for due process hearing at close of business on November 22, 2013, OAH Case No. 2013110737, along with a request to consolidate and continue the two complaints. On November 22, 2013, the District filed its opposition to the consolidation and continuance. Student's request to consolidate OAH Case No. 2013110737 with OAH Case No. 2013070499 is denied. The District's case was filed in July 2013, and on July 31, 2013, the parties submitted a joint request for continuance which represented that Student was filing his own complaint. On August 3, 2013, OAH granted the continuance and set the matter for hearing on December 2-6, 2013 pursuant to the parties' request. After three months delay, Student's request is untimely. Further, the issue in the District's complaint is collateral to Student's issue and sub-issues regarding the Individualized Educational Plan (IEP) and offer of a free appropriate public education (FAPE).

b. Student then made a motion to continue OAH Case No. 2013070499. The District opposed the continuance. It is noted that Student made no request for continuance prior to the PHC, nor does Student's PHC Statement make any reference to a need to continue the matter. Student has known since August 3, 2013, that this matter was set for hearing on the existing dates, yet no attempt was made during the prior three month period of time to secure Dr. Majors' appearance or timely request a continuance. Student's request on the grounds that Student's expert, Dr. Christine Majors, is unavailable to provide testimony is denied.

c. Student has made an objection to the ALJ's exclusion of his exhibits. Student shall be allowed time for brief argument prior to the commencement of testimony to show how these documents are relevant to the sole issue of the hearing.

d. The District's motion to exclude Student's witnesses on the grounds that Student failed to file his Prehearing Statement, Exhibit List and Witness List in a timely manner is denied without prejudice. The District may renew its motion in the event Student fails to provide these documents to the District's attorney by close of business on November 25, 2013.

With the exception of the above, 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 of November 25, 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. Student's request to record the hearing for personal use is granted, on condition he abide by the rules set by the ALJ for recording, or unless revoked by the ALJ.

13. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

14. Hearing Closed To the Public. At the request of the parent, the hearing will be closed to the public. Further, all witnesses shall be excluded from the hearing room. The District may have a representative present at all times during the hearing, even if a potential witness, as long as said representative did not participate as an assessor in the April 2013 assessments.

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.

Dated: November 25, 2013

/s/

JUDITH PASEWARK
Administrative Law Judge
Office of Administrative Hearings