

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2014030842

v.

SPENCER VALLEY ELEMENTARY SCHOOL
DISTRICT,

SPENCER VALLEY ELEMENTARY SCHOOL
DISTRICT,

OAH Case No. 2014030046

v.

PARENTS ON BEHALF OF STUDENT.

ORDER FOLLOWING PREHEARING
CONFERENCE OF JUNE 16, 2014;
DENYING EXCLUSION OF EVIDENCE
WITHOUT PREJUDICE; GRANTING
MOTION FOR RECONSIDERATION;
GRANTING REQUEST TO CHANGE
HEARING VENUE

On June 16, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Paul H. Kamoroff, Office of Administrative Hearings (OAH). Tania L. Whiteleather, Attorney at Law, and Amy Langerman appeared on behalf of Parent on behalf of Student (Student). Deborah R.G. Cesario, Attorney at Law, and Karen M. Anderson, Attorney at Law, appeared on behalf of the Spencer Valley Elementary School District (District). The PHC was recorded.

Following the PHC, ALJ Darrell Lepkowsky has been assigned as the hearing ALJ.

1. Hearing Dates, Times, and Location. The hearing shall take place on June 24, 25, and 30, and July 1 and 2, 2014, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall convene at the **San Diego OAH, located at 1350 Front Street, Suite 3005, San Diego, CA 92101.** The hearing shall begin at 9:30 a.m. the first day of the hearing, at 10:00 a.m. on June 30, 2014, and at 9:00 a.m. all other days, unless otherwise ordered. The hearing shall conclude at 5:00 p.m. on each day except for July 2, 2014, when it will conclude at 3:30 p.m., unless otherwise ordered.

The parties shall immediately notify all potential witnesses of the hearing location and 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. The issues at the due process hearing are listed below.

District’s Issues:

- a) Whether Student’s Individualized Education Program (IEP) of October 25, 2013, (i) provides a free appropriate public education (FAPE) in the least restrictive environment and; (ii) if not, is District permitted to implement Student’s current program at another location, and; (iii) if so, whether District can implement the IEP in its entirety in another location, such as the Julian Union Elementary school?
- b) Whether District failed to timely complete a triennial evaluation?
- c) Whether District denied Student a FAPE by failing to have an IEP in place as of April 2013, through the end of the 2012-2013 school year?
- d) Whether District denied Student a FAPE by failing to have an IEP in place on the first day of school of the 2013-2014 school year?
- e) Whether District denied Student a FAPE by failing to complete an IEP by May 28, 2013?
- f) Whether District denied Student a FAPE by implementing goals from an October 25, 2013 IEP, without the consent of Student’s parents?
- g) Whether District denied Student a FAPE, from April 2013 to the present, by failing to implement (i) behavior supports and (ii) adapted physical education services?
- h) Whether District denied Student a FAPE by refusing to schedule an IEP meeting, pursuant to a parental request for an IEP made in December 2013?

Student’s Issues:¹

- a) Whether the October 25, 2013 IEP offered Student a FAPE in the least restrictive environment?

¹ District’s request to dismiss Student’s issue that District “denied him his rights under ADA, Section 504 and the Unruh Act” is granted.

b) Whether District denied Student a FAPE by failing to implement Student's placement and services during the pendency of this matter?

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"). In the alternative, Student may place "Parent" in front of the exhibit. 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 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 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.

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 prior to June 24, 2014, as to 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 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 parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available 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.

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. 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's motion to allow Sharon Lerner-Baron and Karyn Searcy to testify telephonically is granted. District's motion to allow Elizabeth Jacobsen and Lance Moles to testify telephonically is granted. Student shall provide his witnesses with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing. District shall provide its witnesses with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing.

7. 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, this is a consolidated matter which involves two parties and each party shall bear the burden of persuasion as to its/his issues. Per stipulation between the parties, District shall present its case in chief first, followed by Student. If a witness is to be called by more than one party, each party shall ask their questions of the witness so that the witness does not need to return for testimony.

8. Motions.

Student's motion to exclude evidence:

Prior to the PHC, Student submitted a motion to exclude IEP meeting notes prepared by District on the basis that such notes may constitute hearsay.

In IDEA due process proceedings, any party shall be accorded the right "to present evidence and confront, cross-examine, and compel the attendance of witnesses." (20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2) (2006); Ed. Code, § 56505, subs. (e)(2) and (3).) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, although it is insufficient in itself to support a factual finding, and is often admitted as "administrative hearsay." (Cal. Code Regs., tit. 5, § 3082, subd. (b).)

Here, Student seeks to blanketly exclude evidence, IEP meeting notes, which may be used to supplement or explain other evidence. Therefore, Student's motion to exclude

District's IEP meeting notes is denied without prejudice. Whether District's evidence is inadmissible hearsay may be addressed during the submission of the proposed evidence during the hearing by the ALJ.

Student's motion for reconsideration and request to change venue:

During the PHC, Student requested to move the hearing venue to the San Diego OAH. Student asserts that his representative, Amy Langerman, has a hearing impediment and has difficulty hearing in the room which District has designated for the due process hearing. District does not have an alternative location in which to convene the hearing.

On May 2, 2014, Student submitted a motion to change venue based upon similar grounds. On May 16, 2014, OAH issued an Order denying Student's motion to change venue, and instead ordered that District provide Student's representative with an amplification device to accommodate her hearing impediment. Student's present request to change venue is therefore a motion for reconsideration.

OAH will generally reconsider a ruling upon a showing of new or different facts, circumstances, or law justifying reconsideration, when the party seeks reconsideration within a reasonable period of time. (See, e.g., Gov. Code, § 11521; Code Civ. Proc., § 1008.)

Here, Student asserts that an amplification device is insufficient to accommodate Ms. Langerman's hearing impediment due to the acoustics, noise-level, location and lay-out of District's hearing room. Student points out that the mediation for this matter was convened in this same room, and Ms. Langerman had difficulty hearing the mediator. Consequently, Ms. Langerman would be similarly unable to hear the ALJ if the due process hearing was convened at the same District location, which would unduly prejudice Student.

For the foregoing reasons, Student's request to move the hearing venue to the San Diego OAH is granted.

No additional 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 prehearing conference of June 16, 2014.

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

10. 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.

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. Special Needs and Accommodations. Student's request to move the hearing to an OAH courtroom to accommodate Ms. Langerman's hearing impediment is granted. No further accommodations have been requested by either party.

13. Hearing Closed To the Public. At the request of the parent, the hearing will be closed to the public.

14. 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.

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

IT IS SO ORDERED.

DATE: June 16, 2014

PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings

