

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. 2014030867

ORDER FOLLOWING PREHEARING
CONFERENCE

On July 14, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Deborah Pepaj, Attorney at Law, appeared on behalf of Student. Patrick Balucan, Attorney at Law, appeared on behalf of Los Angeles Unified School District (District), and was accompanied by a legal intern, Hollie Crim. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on July 22-24, 2014, beginning at 9:30 a.m. on the first day, and 9:00 a.m. thereafter, and ending at 5:00 p.m., unless otherwise ordered. Should the hearing not be completed by July 24, 2014, it shall continue Monday through Thursday as needed at the discretion of the ALJ.

The hearing shall take place at the offices of OAH located at 15350 Sherman Way, Suite 300, Van Nuys, California 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.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

a) Did District fail to assess Student in all suspected areas of need after March 23, 2012, which resulted in Student being denied a free appropriate public education?

b) Did District fail to conduct a timely triennial assessment of Student in 2012?

c) Did District deny Student a free appropriate public education after March 23, 2012, because it did not provide Student with a program and services that would meet Student's unique needs, and provide her with educational benefit? ¹

As proposed resolutions, Student is asking for District to fund placement in a nonpublic school, train its personnel concerning legally compliant home instruction, or alternatively, to provide her with compensatory education, and to have District conduct an audiological assessment of Student using a "competent" audiologist.

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 are urged to use different colored binders for the convenience of the witnesses. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), unless they agree to exchange binders on a later date. 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.

The parties are urged to provide resumes of witnesses who are professionals as exhibits during the hearing so as to shorten the questioning time for those witnesses during the hearing. The parties have waived any objection to the production of these resumes after the time for exchanging witness binders pursuant to Education Code section 56505, subdivision (e)(7). Except for good cause shown, or unless used solely for rebuttal or impeachment, any other 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. If Student intends to call as a witness a person previously employed by District, counsel for District shall make every good faith effort to provide Student's attorney with information that will enable Student's attorney to have that witness served with a subpoena.

¹Student filed the request for due process hearing (complaint) on Monday, March 24, 2014. District believes that this precludes Student from adjudicating the appropriateness of an individualized education program that was developed on March 23, 2012, because the complaint was filed more than two years after that date, and there are no facts alleged which would allow the two year statute of limitations established by Education Code section 56505, subdivision (l) to be waived. As will be addressed in another section of this order, the parties have been ordered to brief this issue.

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 close of business on July 18, 2014, as to the schedule of witnesses. The parties will 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 witness schedule will be finalized at the commencement of the due process hearing.

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.

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. 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.

7. Motions. No 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 July 14, 2014.

During the PHC it was noted that Student's complaint was filed on March 24, 2014, more than two years after the development of an individualized education program on March 23, 2012, that Student believes was inappropriate and resulted in a denial of a FAPE. During the PHC Student's attorney argued that because the end of the two year statute of limitations pertaining to this issue fell on Sunday, March 23, 2014, this issue can be considered, notwithstanding the provisions of Education Code section 56505, subdivision (l). Therefore,

Student's counsel is ordered to file a brief supporting her contention in this regard, no later than 5:00 p.m. on Wednesday, July 16, 2014. District may file a reply brief no later than 5:00 p.m. on Thursday, July 17, 2014.

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 during the hearing unless permission to the contrary is obtained from the ALJ.

Student's attorney indicated that she wanted to audio record the proceedings, and the ALJ agreed that she could do so. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. Unlike Superior Court trials, counsel for parties cannot have daily transcripts made of the proceedings as OAH does not have the capacity or resources for this to occur. However, the parties are advised that OAH always makes a digital recording of the proceedings, and this recording is the official record of the hearing. Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is "off the record." Further, proceedings will not be delayed for any party who experiences recording difficulties. Any violation of this order to turn off recorders when the matter goes off the record, or repeated requests to delay the hearing due to recording equipment problems may result in the revocation of permission to record the hearing.

10. Compensatory Education and 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. A Spanish language interpreter is required.

12. Hearing Closed To the Public. Unless otherwise requested by Student's parents, 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 NOON 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.

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

IT IS SO ORDERED.

DATE: July 14, 2014

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings