

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SANTA MONICA-MALIBU UNIFIED
SCHOOL DISTRICT.

OAH CASE NO. 2014050758

ORDER FOLLOWING PREHEARING
CONFERENCE, GRANTING MOTION
FOR TELEPHONIC TESTIMONY,
DENYING MOTION TO CONTINUE
THE HEARING AND DENYING
WITHOUT PREJUDICE STUDENT'S
OBJECTIONS/MOTION TO STRIKE
DISTRICT'S WITNESSES AND
EXHIBITS

On November 21, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Laurie Gorsline, Office of Administrative Hearings (OAH). Parent appeared on behalf of Student. Kristin Myers, Attorney at Law, appeared on behalf of Santa Monica-Malibu Unified School District (District). 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 December 2, 3 and 4, 2014, and will continue day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., with the exception of the first day of hearing, on which day the hearing shall begin at 9:30 a.m., unless otherwise ordered.

The hearing shall take place at Santa Monica-Malibu Unified School District, 2828 4th Street, Santa Monica, California 90405.

District shall provide facilities that fully comply with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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. The issues at the due process hearing are listed below.

Whether District denied Student a free appropriate public education by:

- a. significantly interfering with Parents' right to participate in the educational decision-making process, interfering with Student's right to a FAPE, and depriving Student of educational benefit by predetermining District's November 2013 IEP offer;
- b. failing to offer Student a qualified and trained behaviorist as classroom aide support in the November 2013 IEP;
- c. significantly interfering with Parents' right to participate in the educational decision-making process, interfering with Student's right to a FAPE, and depriving Student of educational benefit by predetermining District's January 2014 IEP offer;
- d. failing to offer Student a qualified and trained behaviorist as classroom aide support in the January 2014 IEP after receiving information about Student's regression and lack of progress; and
- e. significantly interfering with Parents' right to participate in the educational decision-making process, interfering with Student's right to a FAPE, and depriving Student of educational benefit by refusing to comply with Parents' May 2014 request to terminate the educational classroom aide without terminating all special education services and exiting Student from special education.

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. District represents that it has served its exhibit binder on Student in compliance with Education Code section 56505, subdivision (e)(7) .

Pursuant to stipulation of the parties at the PHC, Student shall provide his evidence binder to District's counsel by no later than Monday November 24, 2014.

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 shall meet and confer by November 25, 2014 to delete duplicate exhibits from the exhibit binders.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

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. The parties shall comply with Education Code section 56505 (e)(7). No party shall be permitted to call any witnesses not timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

During the PHC, Student disclosed his list of witnesses. The following witnesses will be called to testify by Student and District is ordered to produce such witnesses at the hearing:

Maeve Crommie
Tara Eddy
Theresa Rubin (as qualified in section 6 below)
Bridgette Warmington
Mr. Quineinella
Allison Jones
Kristopher Vegas
Susan Samarge-Powell

District Witnesses are set forth in its Prehearing Conference Statement.

The parties shall meet and confer by November 25, 2014, as to the schedule of witnesses and coordinate the availability and order 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.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one detailed hour-by-hour and day-by-day schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. District shall prepare the list after meeting and conferring with Parent.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. 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 each witness is expected to take.

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 such evidence. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. 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. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate exhibit binders from all parties, containing all exhibits from each party, and instruct the witness not to remove any documents from the exhibit binders. The hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

District's motion to have Theresa Rubin testify telephonically is granted in the event Ms. Rubin is called as a witness by Student or District on December 3, 4 or 8, 2014, and permitted to testify at the hearing. District shall provide Ms. Rubin with a complete set of duplicate exhibit binders from all parties, containing all exhibits from each party, and instruct the witness not to remove any documents from the exhibit binders. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. District 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.

6. Motions. Student's Objections/Motion to Strike certain of District's exhibits and witnesses is denied without prejudice. Student may orally renew his objections and motion to strike regarding District's witnesses and exhibits at the hearing without filing another written motion or further written objections.

At the PHC, Parent moved to continue the hearing on the grounds that witness Theresa Rubin was not available to testify in person on December 3, 4 or 8, 2014. District opposed the motion on the grounds that the hearing has already been continued at Parent's request. Student's motion to continue the hearing was denied at the PHC because Ms. Rubin is scheduled to be out of state from December 3 through December 8, 2014 and is available to testify in person on December 2, 2014 or by telephone on December 4, 2014.

At present no other prehearing motions are pending or contemplated. Any prehearing motion filed after the prehearing conference shall be supported by a declaration under

penalty of perjury establishing good cause why the motion was not made prior to or at the prehearing conference.

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

The parties shall meet and confer by November 25, 2014 to determine legal and factual stipulations, if any, to be submitted at hearing.

8. Conduct of Counsel/Parties 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. There shall be no texting permitted while the hearing is in session.

The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

9. 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.

10. Special Needs and Accommodations. At present neither party anticipates the need for other special accommodations for any witness or party.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880 or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or (916) 263-0880 as soon as the need is made known. Additional information concerning requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

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

12. 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.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: November 21, 2014

/s/
LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings