

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

NEWPORT-MESA UNIFIED SCHOOL  
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH Case No. 2015010061

ORDER FOLLOWING PREHEARING  
CONFERENCE OF MARCH 9, 2015  
AND (1) DENYING MOTION TO  
CONSOLIDATE AND (2) GRANTING  
REQUEST FOR OBSERVATION

On March 9, 2015, a telephonic prehearing conference was held before Administrative Law Judge Robert Helfand, Office of Administrative Hearings. Alefia Mithaiwala, Attorney at Law, appeared on behalf of the Newport-Mesa Unified School District. Timothy A. Adams, Attorney at Law, appeared on behalf Parent on behalf of Student. 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 March 19, 24, 25, and 26, 2015 at the Newport-Mesa special education offices located at 220 23rd Street, Costa Mesa, CA 92627. The hearing shall continue day to day Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days unless otherwise ordered.

Newport-Mesa shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum 1) a table for Parents and their representatives; 2) a table for Newport-Mesa's legal representative and special education representative; 3) a table for the witness; and 4) a table for the ALJ, near an electrical outlet. Newport-Mesa shall provide drinking water to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night.

The school district shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 1210 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 as follows:

A) Whether Newport-Mesa’s December 11, 2014 multidisciplinary assessment of Student was appropriate?<sup>1</sup>

B) Does Newport-Mesa’s December 11, 2014 Individualized Education Program constitute a free appropriate public education in the least restrictive environment?

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 Newport-Mesa 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 represent that they have served 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.

The parties shall meet and confer no later than November 13, 2014, to eliminate any duplicate exhibits.

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 noon on March 12, 2015, as to the schedule of witnesses. The parties shall attempt to reach agreement on a witness list for the first day of hearing. The parties have agreed to coordinate the availability and order of

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<sup>1</sup> Student does not challenge the Health and Development section of the assessment.

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 submit to OAH at the first day of hearing a list of actual witnesses to be called and the anticipated time for needed to complete each witness's testimony.

Newport-Mesa has listed the following as possible witnesses: Student's mother, Maureen Cottrell, Mary Dawe, Elissa Green Kaustinen, Eunice Hooker, Jessica Olshan, Raul Pando, Rich Peterson, Jean Shanley, Stephanie Thorp, and Lori Williams.

Student has listed the following as possible witnesses: Student's mother; Karen Conway, Ph.D. (designated as an expert witness); Elissa Green Kaustinen; Jessica Olshan; Jean Shanley; Maureen Cottrell; Tina Fast, R.N.; Raul Pando; Mary Dawe; Stephanie Thorp; Megan Swanek; Tyler Lowenthal; Linda Olsen, Fatima Amani; and Emily Bees.

The witness schedule will be finalized at the commencement of the due process hearing. 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.

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.

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.

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.

7. Motions. Student has moved on March 5, 2015, to consolidate this matter with a newly filed case, OAH Case Number 2015030349. In the newly filed case, Student

has alleged that (a) Newport-Mesa's offer of placement pursuant to the November 2013 IEP was not appropriate, and (b) that the December 11, 2014 was not appropriate.

On March 6, 2015, Newport-Mesa filed an opposition to the motion. Newport-Mesa contends that Student had more than ample time to file his complaint in lieu of filing the new case just prior to the Prehearing Conference. Newport-Mesa contends that the "late filing" of the new case is a mere litigation tactic to delay resolution of the District's claims so that Student can continue at his private placement subject to Student's request to be reimbursed for the placement should Student prevail.<sup>2</sup>

Oral argument was heard. Student failed to demonstrate that good cause existed for its filing the new case (OAH Case No. 2015030349) just prior to the PHC. Accordingly, Student's motion to consolidate is DENIED.

Student also requested that his expert be permitted to observe the proposed placements in Student's December 11, 2014 IEP. Newport-Mesa did not oppose the request. Student's request to permit his expert to observe is GRANTED. Newport-Mesa shall permit the expert to conduct observations on Thursday, March 12, 2015 for a period of time up to one hour.

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

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, the OAH ADA Coordinator at [OAHADA@dgs.ca.gov](mailto:OAHADA@dgs.ca.gov) or (916)263-0880 as soon the need is made known. Additional information concerning requests for reasonable accommodations is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

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<sup>2</sup> Student currently attends a non-certified private school.

11. Hearing Closed To the Public. At the request of Student, the hearing shall be closed to 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.

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

IT IS ORDERED.

DATE: March 9, 2015

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/s/  
ROBERT HELFAND  
Administrative Law Judge  
Office of Administrative Hearings