

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ATASCADERO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2015041074

ORDER FOLLOWING PREHEARING
CONFERENCE

On August 10, 2015, a telephonic prehearing conference was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Daniel R. Shaw, Attorney at Law, appeared on behalf of Student. Sarah L. Garcia and Samantha Corner, Attorneys at Law, appeared on behalf of the Atascadero Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at **5601 West Mall, Atascadero, California 93422**, in a room to be provided by Atascadero. It shall take place on August 24, 25, and 26, 2014, and September 21, 22, 23, and 24, 2014, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On August 24 and September 21, 2015, the hearing shall begin at 1:30 p.m. and end at 5:00 p.m., and on the remaining days the hearing shall begin at 9:00 a.m. and end at 5:00 p.m., unless otherwise ordered.

Atascadero shall provide a facility for the hearing that fully complies 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.¹

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

¹ At a minimum, the hearing room shall have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for Atascadero's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table.

continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

2. Issues and Proposed Resolutions.

Issue No. 1: Did Atascadero deny Student a free appropriate public education from April 21, 2013 to January 13, 2016, including extended school years, by:

- a. failing to offer or provide measurable goals in all areas of need;
- b. failing to offer an appropriate placement in the least restrictive environment;
- c. failing to offer appropriate speech and language services;
- d. failing to offer occupational therapy services;
- e. failing to offer physical education, including adapted physical education;
- f. failing to offer appropriate academic instruction;
- g. failing to provide social skills training;
- h. failing to provide appropriate reading instruction;
- i. failing to offer appropriate transportation;
- j. failing to offer mental health counseling between March 31, 2014, and April 21, 2015;
- k. failing to offer inclusion services;
- l. failing to offer assistive technology services and supports; and/or
- m. failing to offer or provide a full school day program?

Issue No. 2: Did Atascadero procedurally deny Student a FAPE from April 21, 2013, through the end of the 2012-2013 school year (including the extended school year) by:

- a. failing to make a clear offer of FAPE at the June 7, 2013 individualized education program team meeting;
- b. failing to consider a continuum of placement options at the June 7, 2013 IEP team meeting; and/or

c. predetermining Student's placement offer at the June 7, 2013 IEP team meeting?

Issue No. 3: Did Atascadero procedurally deny Student a FAPE during the 2013-2014 school year, including the extended school year, by:

- a. failing to make a clear offer of FAPE at IEP team meetings;
- b. failing to consider a continuum of placement options at IEP team meetings;
- c. predetermining Student's placement offer(s) at IEP team meetings];
- d. failing to convene an IEP team meeting when Student was not making anticipated progress; and/or
- e. failing to offer or provide accurate present levels of performance at IEP team meetings?

Issue No. 4: Did Atascadero procedurally deny Student a FAPE during the 2014-2015 school year (including extended school year) up to June 22, 2015, by:

- a. failing to make a clear offer of FAPE at IEP team meetings;
- b. failing to consider a continuum of placement options at IEP team meetings;
- c. predetermining Student's placement offers at IEP team meetings;
- d. failing timely to conduct a mental health assessment after receipt of the June 4, 2014 Educationally Related Mental Health Services assessment plan signed by Parent on or about June 23, 2014;
- e. failing to timely convene an annual IEP team meeting and make a timely offer of FAPE; and/or
- f. failing to offer or provide accurate present levels of performance at IEP team meetings?

Issue No. 5: From April 21, 2013, to June 22, 2015, did Atascadero fail to adequately assess Student in the areas of psychoeducational status, mental health status, assistive technology needs, speech and language needs, occupational therapy needs, and transition needs?

As resolutions, Student seeks 1) an order answering the above questions in the affirmative; 2) an order requiring Atascadero a) to provide an appropriate placement in an adult transition placement or other setting; b) to provide independent psychoeducational, mental health, assistive technology, speech and language, occupational therapy, and transition assessments; and c) to convene an IEP team meeting to review the results of the independent assessments and to fund the presence of the assessors at the meeting; and 3) an order bifurcating the hearing so that compensatory education shall be considered only after the requested independent assessments have been provided.

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 in a way that makes clear the party offering it (such as “S1” or “D2”). 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party by 5:00 p.m. on August 17, 2015, 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.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party’s prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student has identified 27 witnesses to be called at the hearing, and Atascadero has identified 25 witnesses. Some of the witnesses are listed by both parties. In light of the fact that six days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and on OAH a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. Each revised witness list shall contain an estimate of the length of each witness’s direct examination testimony. The parties are encouraged to meet and confer on a proposed witness list for at least the first day of hearing. 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 their testimony.

5. Scope and Order 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

6. Telephonic Testimony. At present no party intends to present a witness by telephone. A party seeking to present a witness by telephone shall move in advance for leave to do so; 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.

7. Electronic Recording of Hearing.

a. Audio Recording. The parties' motions to make their own audio recordings of the hearing are granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the parties' recordings will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the parties' recording mechanisms will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Motions. At present no prehearing motions are pending or contemplated, except that Student may move for an order allowing her expert to examine a proposed placement if voluntary arrangements between the parties are not successful. Any other motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during this prehearing conference.

9. 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. Subject to a possible later order bifurcating the hearing, a party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education, as part of its case in chief.

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

11. 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.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter. 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 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>.

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

14. Settlement. The parties are encouraged to continue their attempts 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. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. IF A FULL AND FINAL SETTLEMENT 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, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. 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.

Dated: August 12, 2015

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings