

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH Case No. 2015050337

v.

LEMON GROVE ELEMENTARY SCHOOL
DISTRICT,

LEMON GROVE ELEMENTARY SCHOOL
DISTRICT,

OAH Case No. 2015090042

v.

ORDER FOLLOWING PREHEARING
CONFERENCE OF OCTOBER 9, 2015

PARENTS ON BEHALF OF STUDENT.

On October 9, 2015, a telephonic prehearing conference was held before Administrative Law Judge Robert Helfand, Office of Administrative Hearings. Erin J. Minelli and Matthew H. Storey, Attorneys at Law, appeared on behalf of Parents on behalf of Student. Deborah R.G. Cesario, Attorney at Law, appeared on behalf of Lemon Grove Elementary School District. The PHC was not recorded by OAH.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on October 19, 20, 27, and 29, 2015. The hearing shall continue day to day Monday through Thursday as needed at the discretion of the ALJ. The hearing shall take place at the Liberty Charter School located 8425 Palm Street, Lemon Grove, CA 91945. The hearing will commence starting at 1:30 p.m. on October 19, 2015, and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, the named local educational agency 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 et seq.), the Unruh

Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall provide drinking water and tissue 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. District shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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, and the proposed resolutions, are listed below.

Student's Issues

- (1) Since December 14, 2014, has District denied Student a free appropriate public education by failing to provide Student with a completed Individualized Education Program?
- (2) Whether District's failure to timely provide Student with a copy of the January 25, 2015 IEP document and meeting notes denied Student a FAPE?
- (3) Whether District's April 27, 2015 offer of placement at Sierra Academy was not appropriate such as it denied him a FAPE?
- (4) After the December 14, 2014, did District deny Student a FAPE by failing to conduct a vision therapy assessment after it had agreed to at the December 14, 2014 triennial IEP meeting?

District's Issues

- (5) Whether District offered Student in a FAPE in the least restricted environment pursuant to the December 15, 2014 Triennial IEP and thereafter as amended?

- (6) District raises as an affirmative defense: whether the February/march 2014 settlement agreement executed between the parties precludes or otherwise limit what Student may be awarded?

Student's proposed resolutions are (a) District to reimburse Student for all costs incurred in maintaining Student's placement at Banyan Tree Foundations Academy and Newbridge School including transportation; (b) District to reimburse Student for the costs incurred for vision therapy services; (c) District to fund Student's continuing placement at Newbridge School and provide transportation; (d) District to assess Student in the area of vision therapy; (e) District to fund an Independent Education Evaluation in the area of Assistive Technology; (f) District to provide compensatory education to Student according to proof; (g) District to provide training to its special education staff on affirmative duties under the Individuals with Disabilities Education Act; (h) District to reimburse Student for any advocacy fees and costs incurred; and (i) District to pay interest on any monies paid or owed by Student.

District's proposed resolution is for OAH to issue an order that its Triennial IEP, as amended, offered Student a FAPE in the least restricted environment. District also seeks an order by OAH that the February/March settlement agreement reduces or precludes Student proposed remedies.

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 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.

Student lists the following as witnesses: Student's parents; Heidi Bergener; Lori Tan; Ginger Gisler; Dr. Carl Hillier; Kimberly Robertson; Stefani Suzuki; Nanci Engle; Melissa McGowan; Ellen Garrido; Charlette Martin; Kayla Silva; Dr. Bobbi Burkett; Eric Mora; Steven Mayo; Dr. Sara Frampton; Seth Schwartz, Esq.; Leanne Gattegno; Dan Decker; Steve Oas; Debbie Streeter; and Brandi Eagling.

District lists the following as witnesses: Dr. Bobbi Burkett; Charlette Martin; Lori Tan; Leanne Gattegno; Stefanie Suzuki; Kayla Silva; Ellen Garrido; Student's parents; and a representative from Sierra Academy.

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. District shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. 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.

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. Electronic Recording of Hearing.

a. Audio Recording. Student and District request to make an audio recording of the hearing is granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording 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 party's recording mechanism will not be allowed to delay the hearing.

8. Order of Presentation of Evidence. Student will present his case first followed by District presenting its case.

9. Motions. Student has indicated that he may file the following motions prior to the first day of hearing: (1) change of venue to the San Diego office of OAH; (2) to permit telephonic testimony of Dr. Carl Hillier; and (3) motion to recover costs for subpoena service on provider witnesses. Student is directed that any prehearing motions must be filed at least three business days prior to the first day of hearing.

District does not intend to file any pretrial motions.

10. 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.

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

12. 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.

13. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, as soon as the need is known. Additional information concerning requests for reasonable accommodation is available on OAH's website at:
<http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>

14. Hearing Closed To the Public.

15. 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.

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

IT IS SO ORDERED.

DATE: October 12, 2015

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