

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015010428

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 16, 2015, a telephonic prehearing conference was held before Administrative Law Judge B. Andrea Miles, Office of Administrative Hearings. Student's father appeared on behalf of Student. Minerva Garcia interpreted the prehearing conference for Father. Jessica Gasbarro, Attorney at Law, appeared on behalf of Sacramento City Unified School District. The PHC was recorded.

On October 19, 2015, the telephonic PHC was reconvened by ALJ B. Andrea Miles. Student's father appeared on behalf of Student. Ana Guevara interpreted the prehearing conference for Father. Jessica Gasbarro, Attorney at Law, appeared on behalf of Sacramento City Unified School District. The PHC was recorded.

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

1. Motion for Continuance of the Due Process Hearing: At the beginning of the prehearing conference on October 16, 2015, Father requested to continue the due process hearing in order to have additional time to secure counsel. Sacramento City opposed Father's request.

On January 5, 2015, Parents, who were unrepresented, filed a complaint against Sacramento City on behalf of Student. On February 2, 2015, Attorney at Law, Nicole Hodge Amey, filed a notice of representation. On February 26, 2015, Student's motion to amend the complaint was granted by OAH and Student's amended complaint was deemed filed as of February 25, 2015. All timelines in the case were reset based on the amended complaint.

On April 13, 2015, the parties were granted a continuance of the prehearing conference and the due process hearing in order to give the parties time to mediate the case. On May 15, 2015, Ms. Hodge Amey withdrew as Student's counsel and requested a continuance on behalf Student so Parents could have time to retain new counsel and so that

the documents could be translated into Spanish for Parents. OAH granted Student's request for a continuance. The due process hearing was continued to October 6, 7, and 8, 2015.

On September 3, 2015, Parents requested another continuance of the due process hearing on the basis that an evaluation of Student was being conducted and that Parents needed to serve documents on Sacramento City. Parents' request for continuance was granted, however, the order granting the continuance specified that "no further continuance" would be granted.

During the prehearing conference on October 16, 2015, Father indicated that he had been unable to retain counsel to represent Student. Father specified that he wanted only to hire an attorney who spoke Spanish. In response to the ALJ's inquiry, Father indicated that he had contacted four attorneys about representing Student and that all four attorneys had declined to represent Student.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332 .) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Father failed to show good cause for an additional continuance of the due process hearing. This matter was filed at the start of January 2015 and has been over nine months. Parents had five months, over half the life of this case, to retain a new attorney to represent Student. Therefore, Father's request to continue the due process hearing was denied on October 16, 2015. On October 19, 2015, Father repeatedly renewed his motion for a continuance based on the same grounds. Father's repeated requests to continue the hearing was denied on October 19, 2015, as well.

During the PHC on October 16, 2015, after Father's repeated requests for a continuance of the hearing were denied, Father asserted he was ill and could not continue with the PHC on that day. The undersigned continued the PHC to October 19, 2015. When the PHC reconvened on the morning of October 19, 2015, Father refused to further participate when his motion to continue was again denied. The phone call was terminated and the undersigned reconvened the PHC in the afternoon of October 19, 2015. The PHC was finally concluded during that session.

2. Hearing Dates, Times, and Location. The hearing shall take place on October 27, 28, and 29, 2015, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 5735 47th Avenue, Sacramento, California 95824. The hearing shall begin at 9:30 AM the first day of the

hearing and at 9:00 AM all other days, unless otherwise ordered. The hearing shall conclude at 5:00 PM on each scheduled day, unless otherwise ordered.

The named local educational agency will to 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 local educational agency shall inform OAH within two days of the date of this order it is able to certify that it will provide a facility that complies with the law by filing the certification form located on OAH's website.

Prior to the beginning of the hearing, Sacramento City shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a table for Sacramento City's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Sacramento City shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ.

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.

3. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolutions, are listed below.

Issue 1: Did Sacramento City deny Student a free appropriate public education by:

- a. Failing to conduct an appropriate academic assessment of Student;
- b. Failing to conduct a Functional Behavioral Assessment of Student;
- c. Failing to conduct an appropriate behavior assessment of Student;
- d. Failing to conduct a Selective Mutism assessment of Student; and
- e. Failing to conduct an appropriate psychoeducational assessment of Student?

Issue 2: Did Sacramento City deny Student a FAPE from the beginning of the 2013-2014 school year through December 2014, by failing to design and implement an appropriate individualized education program with appropriate:

- a. Academic supports;

- b. Behavior supports; and
- c. Behavior goals?

Issue 4: Did Sacramento City deny Student a FAPE from the beginning of the 2013-2014 school year through December 2014, by failing to offer:

- a. School-based counseling services;
- b. Mental health services;
- c. Classroom accommodations; and
- d. A one-to-one aide?

Issue 5: Did Sacramento City deny Parents the right to meaningfully participate in the IEP development process by failing to take into account Parents' concerns from the beginning of the 2013-2014 school year through February 25, 2015.

Proposed Resolution 1: Student seeks an order that Sacramento City be required to provide Student with compensatory education and services in all areas of need, including, intensive academic instruction in math, English Language Arts, reading, speech and language, counseling, and one-to-one tutoring.

Proposed Resolution 2: Student seeks an order requiring Sacramento City to develop a proper IEP with behavior goals, academic goals, additional speech and language services, and school counseling.

Proposed Resolution 3: Student seeks an order requiring Sacramento City to provide Student with a FAPE by providing Student with and appropriate placement and services.

Proposed Resolution 4: Student seeks an order requiring Sacramento City to provide Student transportation to and from his prospective educational placement and to any other location where Student receives compensatory educational and related services.

4. 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.

5. 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 shall attempt to reach agreement on a witness list for the first day of 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. Sacramento City 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.

Prior to the PHC, Parent had not provided a PHC statement that included a list of the witnesses who he intends on calling at the hearing. During the PHC, Parent provided the following list of witness:

- a. Isabel Govea, the principal at Harkness Elementary;
- b. Nick Manupen, a teacher with Sacramento City who attended the November 2014 IEP team meeting;
- c. Helen Badmehr, a teacher who works at Harkness Elementary;
- d. Dana Weist, Sacramento City speech and language pathologist;
- e. Tawney Lamvert, a nurse with Sacramento City;
- f. Linda Rivera, a Sacramento City speech and language therapist;
- g. Cruz Huzman, a Spanish interpreter with Sacramento City, who helps Spanish speaking parents with the enrollment process;
- h. Daniel Hernandez, the principal at Ethel Phillips Elementary;

- i. Rachel Lane, the principal at Nicholas Elementary School;
- j. Student;
- k. Mother;
- l. Father; and
- m. Jake Randall, MSW, an expert who is in the process of assessing Student.

6. 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.

7. 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.

8. Electronic Recording of Hearing.

a. Audio Recording. Neither party requested to make their own an audio recording. If either party desires to make such a recording, that party shall move for leave to do so in advance of the hearing. In the event that a party's request to make an independent audio recording of the hearing is granted, the follow conditions shall apply: 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.

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.

9. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student is the petitioning party.

Generally, the party bearing the burden of proof would begin. However, the parties have agreed that Sacramento City will present its case-in-chief first, followed by Student

10. 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 October 19, 2015.

11. 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.

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

13. Conduct of the Parties and Hearing Room Decorum. Counsel, Parents, 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.

14. Special Needs and Accommodations. A Spanish interpreter will be provided Father and Mother throughout the hearing.

Any other 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>

15. Hearing Open To the Public. The hearing will be open to the public at Parent's request.

16. 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.

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

IT IS SO ORDERED.

DATE: October 20, 2015

/s/
B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings