

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT AND WALNUT VALLEY
UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015030166

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 23, 2015, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. F. Richard Ruderman, Attorney at Law, appeared on behalf of Student. Sarah L. Garcia, Attorney at Law, appeared on behalf of the Sacramento City Unified School District. Angela Gordon, Attorney at Law, appeared on behalf of the Walnut Valley 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 5735 47th Ave., Sacramento, California 95824, in a room to be provided by Sacramento City. It shall take place on November 5, 9, 10, 12, 16, 17, 18 and 19, 2015, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of hearing; 1:30 p.m. on Monday, November 16, 2015; and at 9:00 a.m. on all other days, unless otherwise ordered.

Sacramento City shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 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.

Prior to the beginning of the hearing, Sacramento City 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 Sacramento City's legal representative and special education representative; (3) a table for Walnut Valley's legal representative and special education representative; (4) a table for the witness; and (5) a table for the ALJ, near an electrical outlet. Sacramento City shall provide drinking water and have tissue available to all parties, witnesses and the ALJ. Unless otherwise ordered, 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 at lunch breaks and following the hearing each night.

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.

Issue No. 1: Did Sacramento City substantively deny Student a free appropriate public education during the 2012-2013, 2013-2014 and 2014-2015 school years, including extended school years, by:

- a. Failing of offer an appropriate placement;
- b. Failing to offer a residential placement;
- c. Failing to implement her individualized education programs;
- d. Failing to offer adequate speech and language therapy;
- e. Failing to offer a health plan;
- f. Failing to offer an adequate behavior support plan;
- g. Failing to offer a one-to-one aide;
- i. Failing to offer adequate occupational therapy;
- j. Failing to offer any school nurse services in school year 2012-2013, and failing to offer adequate nurse services in school years 2013-2014 and 2014-2015; and
- k. Failing to offer adequate and measurable goals in all areas of need?¹

Issue No. 2: Did Sacramento City procedurally deny Student a FAPE during the 2012-2013 school year, including extended school year, by:

¹ The division of issues into substantive and procedural categories in this Order is only for the convenience of the ALJ and the parties, and does not constitute a ruling on whether any particular issue is substantive or procedural.

a. Failing to ensure the presence at all her IEP team meetings of all necessary IEP team members, including an administrator who could make a placement recommendation;

b. Failing to conduct assessments in all areas of need, specifically in the areas of psychoeducational status, behavioral needs, speech and language needs , and occupational therapy needs;

c. Failing in 2012-2013 to develop a transition plan for her full-time return to public school, and

d. Failing to make a clear written offer of placement and services?

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

a. Failing to conduct appropriate assessments in the areas of (1) psychoeducational status; (2) health; (3) transition needs; (4) academic achievement; (5) functional behavior; and (6) sensory processing (occupational therapy);

b. Failing to convene an IEP team meeting to consider her needs before changing her placement;

c. Failing to make a clear written offer of placement and services;

d. Failing to include all necessary IEP team members at IEP team meetings;

e. Failing to obtain Parents' written consent before changing her placement to a non-public school; and

f. Failing to develop a transition plan for her transition to post-secondary living?

Issue No. 4: Did Sacramento City procedurally deny Student a FAPE during the 2014-2015 school year, including extended school year, by:

a. Failing to conduct appropriate assessments in the areas of (1) psychoeducational status; (2) health; (3) transition needs; (4) academic achievement; (5) functional behavior; and (6) sensory processing (occupational therapy);

b. Failing to convene a timely IEP team meeting when Student did not make anticipated progress:

c. Failing to make a clear written offer of placement and services;

d. Failing to include all necessary IEP team members at IEP team meetings;

e. Failing to obtain Parents' written consent before changing her placement to a non-public school;

f. Implementing as to Student a policy and practice of refusing to offer or provide residential placements for students under any circumstances other than a court or administrative order;

g. Failing to provide prior written notice to Parents regarding their request for funding any transportation associated with any regional center placement, and

h. Failing to develop a transition plan for her transition to post-secondary living?

Issue No. 5: Did Sacramento City deny Student a FAPE in the 2015-2016 school year by:

a. Failing to offer a residential placement;

b. Failing to fund the transportation costs associated with the Alta California Regional Center's placement of Student in a residential group home;

c. Failing to fund Parents' share of costs associated with the Alta California Regional Center's placement of Student in a residential group home;

Issue No. 6: Did Walnut Valley deny Student a FAPE in the 2015 extended school year by:

a. Failing to offer or ensure an extended school year placement;

b. Failing to offer a residential placement;

c. Failing to fund the transportation costs associated with the Alta California Regional Center's placement of Student in a residential group home;

d. Failing to fund Parents' share of costs associated with the Alta California Regional Center's placement of Student in a residential group home; and

e. Failing to implement Student's December 2014 IEP?

As resolutions, Student seeks:

a. Declarations that Sacramento City and Walnut Valley denied Student a FAPE during the times and in the ways set forth in the statement of issues;

b. A declaration that Sacramento City is responsible for Student's prospective services;

c. Funding by Sacramento City of independent assessments in the areas of: (1) psychoeducational status; (2) health; (3) transition needs; (4) academic achievement; (5) functional behavior; and (6) sensory processing (occupational therapy), and funding of the attendance of the assessors at the IEP team meeting(s) convened to discuss the assessment results;

d. Provision in Student's IEP of appropriate goals, a behavior support plan, a health plan and a transition plan;

e. Placement of Student by both Sacramento City and Walnut Valley in an appropriate residential treatment facility, through the 2015-2016 school year, including extended school year, with costs of Parents' visits; or alternatively in an appropriate day school during that period;

f. Compensatory education according to proof, including speech and language, mental health, and occupational therapy, and behavioral and transition services;

g. Reimbursement by both Sacramento City and Walnut Valley of Parents' transportation costs associated with the Alta California Regional Center's placement of Student in a residential group home, and reimbursement of their share of costs associated with that placement; and

h. Reimbursement for Parents' and the Alta California Regional Center's expenditures for placing Student in a residential placement;

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 clearly identifies the party offering it (such as "S1" or "SCD2" or "WVD2"). 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 parties by 5:00 p.m. on October 29, 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 except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b. Student has identified 61 witnesses to be called at the hearing; Sacramento City has identified 23 witnesses; and Walnut Valley has identified 12 witnesses. Some of the witnesses are listed by all parties. In light of the fact that 8 days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. 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.

c. At the beginning of the hearing, each party shall serve on the other parties 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. 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.

d. The parties shall attempt to reach agreement on a witness list for the first day of hearing. Sacramento City shall have witnesses available in case agreement on a witness list for the first day is not reached. 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 and Order 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, so the parties shall establish their cases in chief during the first appearance of a witness.

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).) Walnut Valley's motion to allow witnesses from Southern California to testify by telephone, and/or by video if appropriate arrangements with Sacramento City can be made, is granted. At present no other 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, unless the opposing party has stipulated that the witness may appear by telephone. The proponent of any witness appearing by telephone 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 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 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.

8. 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 requested the hearing and shall present her case-in-chief first, followed by Sacramento City and then Walnut Valley.

9. Motions.

a. Sacramento City's motion to continue the hearing and its objections to the dates calendared for hearing were overruled at the PHC, without prejudice to its making of a further motion for a continuance or alteration of hearing dates;

b. Sacramento City's motion, joined by Walnut Valley, to bifurcate the portions of the matter relating to itself from the portions relating to Walnut Valley was denied without prejudice to the renewal of that motion;

c. At present no other prehearing motions are pending or contemplated. Any 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.

10. 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.

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.

At present none of the parties 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, identified in the scheduling order, at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 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. The hearing will be closed to the public unless Parents timely request that it be opened.

15. 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. In addition, if a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall immediately inform OAH of that fact 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 showing all required signatures 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.

Dated: October 23, 2015

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings