

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015070157

ORDER DENYING MOTION TO
CONSOLIDATE AND CONTINUE
MATTER AND ORDER FOLLOWING
PREHEARING CONFERENCE

On November 30, 2015, a telephonic prehearing conference was held before Administrative Law Judge Chris Butchko, Office of Administrative Hearings. Surisa Rivers, Attorney at Law, appeared on behalf of Student. Lyndsy Rodgers, Attorney at Law, appeared on behalf of District. The PHC was recorded.

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

1. Motion to Consolidate and Continue. On November 24, 2015, District filed a motion to consolidate this matter with a new action it had filed. Student did not join the motion. The new case, OAH No. 2015111212, is District's defense of its April 21, 2015, psychoeducational assessment. In Student's case, the due process hearing request charges that the April 2015 evaluation did not have any standardized testing of Student's auditory processing, did not have teacher input in the BASC-2, and did not include observation of Student. Student here seeks as relief an independent psychoeducational assessment. District's case will be mooted if Student prevails here.

District seeks consolidation of its action with this matter because it involves the same parties and similar issues of law and fact. Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve common questions of law and/or fact and are between the same parties, and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

District's case is substantially related to the action here, but consolidation is not appropriate for two reasons. First, judicial economy would not be served by adding to the issues to be heard. As noted above, District's issue is substantially present here. Adding that

action to this one will require resolving the question of whether District acted in late November to defend its April assessment without “unnecessary delay.” (34 C.F.R. § 300.502(b)(2) (2006); Ed. Code, § 56329, subd. (c).) Student’s complaint does not allege that Parents requested an independent educational evaluation from District, which District denied and then failed to file a timely due process hearing request to defend its April 2015 psychoeducational assessment. Making that determination will require evidence and testimony far beyond the scope of this action. Secondly, District reports in its motion that it will require “adequate time to prepare its case” in the newly-filed action and will be prejudiced if forced to proceed now in the consolidated action. Delaying this action to add the new matter is not proper.

This matter has twice been continued at the parties’ request. 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 for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party’s excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

District states that it will be unable to proceed if the cases are consolidated without a further continuance. A continuance is not appropriate: the request has been made shortly before the hearing date, previous continuances have been granted, and good cause does not exist for the continuance. District’s other presented grounds for continuance are that its representative and counsel have another hearing scheduled during this time. District has been aware of this conflict since October 28, 2015, when it sought a continuance in that third case because of the conflict with the hearing dates set here. Being so aware, District has not acted until now. Accordingly, Student’s interest in a timely resolution of his action outweighs District’s interest in having a particular representative or counsel attend this hearing. Given that consolidation is not requested unless a continuance is also granted, both consolidation and continuance must be and are denied.

2. Hearing Dates, Times, and Location. The hearing in this matter will take place on December 8 through 10 and 15th, 2015, and continue day to day thereafter as needed at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day and at

9:00 a.m. on all subsequent days. The hearing shall take place at the Walnut Valley Unified School offices located at 880 South Lemon Avenue, Walnut, CA 91789.

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.

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.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. The named local educational agency certified that the facilities used for this case comply with the law. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

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.

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

1. Was student denied a free appropriate public education in the 2013-2014 and 2014-2015 school years by a) District’s failure to determine his present levels of performance and to set appropriate goals in his IEP reports; b) District’s failure to address his homework and testing needs; and c) District’s failure to address his fluency disorder needs between August 2013 and April 2015, and failure to provide speech and language services since April 2015 to the date of Student’s due process hearing request?

2. Whether District failed to assess student in all areas of suspected disability, namely a) by failing to conduct a psychoeducational assessment in the fall semester of 2013-2014 school year for dysfluency and auditory processing deficits, and 2) by failing to conduct a speech and language assessment for auditory processing deficits in 2015.

Student's proposed resolutions include an IEE in Speech and Language to address the fluency disorders, a psychoeducational IEE, an IEP meeting, teacher training, compensatory speech and language services, and compensatory educational tutoring.

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 consecutively numbered or 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.

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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

All witnesses will be excluded from the hearing room when they are not testifying. Witnesses who have testified are admonished not to discuss their testimony with others until the completion of the hearing.

The parties have agreed to coordinate the availability and order of 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 have agreed to meet and confer to prepare a final witness list, including the anticipated order of the witnesses to be called at the hearing and an estimate of the length of time for the direct examination of each witness the party actually intends to call. Further, 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 present the ALJ with a written joint schedule for each day of hearing at the commencement of each day's session.

6. Scope of Witness Examination. To complete the hearing in a reasonable time and for the convenience of the witnesses, both parties are to be prepared to conduct their direct examination 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.

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 a witness appearing telephonically 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. At this time, neither party intends on introducing telephonic testimony. Neither party anticipates needing to present testimony telephonically.

8. Order of Presentation of Evidence. Student is the petitioner, bears the burden of proof, and will first present evidence as to his issues. The witnesses who are to be called by more than one party will first be examined by Student's counsel. After their direct testimony, District may present them for direct testimony on its behalf and for any cross-examination. Each side will then have the opportunity for further questioning, limited in scope as set forth in Item 6, above.

9. Motions. No pretrial motions are pending or anticipated. 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.

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. 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.

13. Special Needs and Accommodations. No accommodations or interpretation services are expected to be required.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar staff identified in the scheduling order as soon as the need is made known.

14. Hearing Closed To the Public. The hearing will be 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: November 30, 2015.

/s/

CHRIS BUTCHKO
Administrative Law Judge
Office of Administrative Hearings

