

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015050922

ORDER FOLLOWING PREHEARING
CONFERENCE AND CONTINUING
DUE PROCESS HEARING

On November 13, 2015, a telephonic prehearing conference was held before Administrative Law Judge Elsa H. Jones, Office of Administrative Hearings. Marcy Tiffany, Attorney at Law, and Jennifer Ralph, Ms. Tiffany's paralegal, appeared on behalf of Student and Parent (collectively, Student). Sharon Watt, Attorney at Law, appeared on behalf of the Torrance Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing is continued by agreement of the parties, for good cause shown, following the filing by District on November 9, 2015, of a motion to reconsider the denial of its motion to continue, and the denial of the motion for reconsideration on November 10, 2015, without prejudice. 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) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause.

The parties agreed that the hearing shall take place on December 1 and December 8-10, 2015, and shall continue day to day, Monday through Thursday as needed, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 2335 Plaza Del Amo, Torrance, California 90501. Unless otherwise ordered, the first day of hearing shall begin at 9:30 a.m., and all subsequent hearing days shall begin at 9:00 a.m.

The parties have agreed that Ms. Watt may appear by telephone on December 1, 2015. By no later than noon on November 30, 2015, Ms. Watt shall give her contact phone number to the District representative who will be attending the hearing, so that the ALJ may call Ms. Watt and convene the hearing as scheduled. District shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the Ms. Watt, and that allows Ms. Watt to hear the proceedings.

District 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. Within two business days of the date of this Order, District shall file a certification with OAH that the facilities used for this case comply with the law. District shall inform OAH within two business 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 representatives; (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.

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 was 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

A. Whether District deprived Student of a free appropriate public education by reason of the following:

1. Failing to implement the last agreed upon and implemented individualized education program, dated May 9, 2014, from November 2014 to September 22, 2015;
2. Failing to have an IEP in place at the beginning of the 2015-2016 school year;
3. Failing to make a specific offer of placement for the 2015-2016 school year;
4. Failing to make an appropriate offer of placement in the least restrictive environment for the 2015-2016 school year; and
5. Failing to conduct an appropriate psychoeducational assessment in spring 2015.

Student's proposed resolutions include: Compensatory education; District to implement Student's May 9, 2014 IEP pending development of a new IEP; District to convene an IEP team meeting to provide an appropriate placement; District to provide Student an appropriate Applied Behavior Analysis program for the entire school day by a qualified nonpublic agency of Student's choice; and District to fund an independent psychoeducational assessment.

District's Issue:

Whether District's psychoeducational assessment conducted in spring 2015 was appropriate, such that Student is not entitled to an independent psychoeducational assessment at public expense.

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 whether 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 represented that they 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 a party's exhibit list and not previously exchanged shall not be admitted into evidence at the hearing at the request of that party except for good cause shown, and unless the ALJ rules that it is otherwise admissible.

4. Witnesses. The parties shall serve their final witness lists upon each other and file them with OAH in accordance with Education Code sections 56505, subdivision (e)(7). Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available, upon timely notice. Neither party shall be permitted to call any witnesses not disclosed in the party's final witness list except for good cause shown, and at the discretion of the ALJ.

The parties shall schedule their witnesses to avoid delays in the hearings and to minimize or eliminate the need for calling witnesses out of order. The parties are encouraged to review and curtail 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

Except for parties, and individuals who are serving as representatives of parties for purposes of appearance at hearing, no witnesses will be allowed in the hearing room during the proceedings except when that witness has been called to testify.

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. At all times throughout the hearing, the parties shall be prepared to discuss the witness schedule and the time the testimony of each 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, at the discretion of the ALJ. 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. The witness shall testify from a landline telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the hearing is denied without prejudice.

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].) This matter involves two parties, each of whom has requested a hearing, and their complaints have been consolidated. The order of presentation of evidence shall be as follows: Student is to present his case-in-chief first.

9. Motions. On November 9, 2015, District filed a motion to amend its complaint to allege that its behavioral assessment was appropriate and that Student was not entitled to an independent behavioral assessment at public expense. On November 9, 2015, Student filed an opposition to the motion, on the grounds that it had withdrawn its request for an independent behavioral assessment. At the PHC, the parties agreed that the motion was moot and need not be ruled on by the ALJ. No other 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 PHC of November 13, 2015.

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 writing.

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 placed on the vibrate setting during the hearing unless permission to the contrary is obtained from the ALJ. There shall be no texting or tweeting during the hearing unless the ALJ grants permission. There shall be no weapons in the hearing room at any time, except as may be carried by law enforcement personnel.

13. Special Needs and Accommodations. No party has requested any special accommodation or interpreter services. 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, 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. The hearing shall be closed to the public, unless Student requests otherwise.

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 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 or with Education Code section 56505, subdivision (e)(7) may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: November 17, 2015

/s/

ELSA H. JONES
Administrative Law Judge
Office of Administrative Hearings