

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

PASADENA UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2015090956

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 30, 2015, a telephonic prehearing conference was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Ben Conway and Mayra Lira, Attorneys at Law, appeared on behalf of Student. Meredith B. Reynolds, Attorney at Law, appeared on behalf of the Pasadena 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 shall take place on December 9, 10, 15, 16, and 17, 2015, and continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at 2046 N. Allen Ave., Room 207, Altadena, California 91001. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, Pasadena 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. Pasadena is in the process of certifying that the facilities used for this case comply with those laws, and shall file its certification with OAH within 5 business days of this Order. 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, Pasadena 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 Pasadena's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Pasadena 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 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:

A. Did Pasadena deny Student a free appropriate public education during the 2013-2014 and 2014-2015 school years by:

1. failing to assess her in all areas of suspected disability;
2. failing to conduct adequate assessments of her, including her behavior;
3. failing to place her in the least restrictive environment;
4. failing to offer or provide needed specialized instruction and related services, as follows:
 - a. failing to offer or provide an adequate behavior plan;
 - b. failing to offer or provide adequate school-based behavior services;
 - c. failing to offer or provide adequate parent/family counseling; and
 - d. failing to offer or provide nonacademic and extracurricular activities;
5. failing to offer or provide measurable annual goals to meet her educational needs;
6. failing to consider the harmful effects to Student and to the quality of her services in selecting her placement;
7. failing to consider all relevant data in writing her IEP's;

8. failing to include accurate present levels of academic achievement and functional performance in her IEP's of September 17, 2013; March 5, 2014; November 6, 2014; and May 12 and 28, 2015;

9. failing to provide prior written notice of changes in her identification, evaluation, and educational placement;

10. substantially impeding the right of Student's educational rights holder to participate in the IEP process by failing to consider her input or that of Student's caregivers from Hillsides; and

11. failing to implement the special education and related services required by her IEP's of September 17, 2013; March 5, 2014; November 6, 2014; and May 12 and 28, 2015?

B. Did Pasadena fail to provide Student's educational rights holder all of Student's educational records?¹

As resolutions, Student seeks an order that Pasadena 1) provide Student a mainstream placement; 2) convene an IEP team meeting to revise her IEP; 3) provide an independent functional behavior assessment, a positive behavior intervention plan, and a psychoeducational assessment; and 4) fund a variety of compensatory education services set forth in Student's complaint.

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 "D2"). 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 party or parties by 5:00 p.m. on December 2, 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 timely 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.

¹ Student's complaint alleges that Pasadena denied FAPE to students other than Student and seeks certification of a class. It also alleges that Pasadena violated the Americans With Disabilities Act and the Rehabilitation Act of 1973. These allegations are omitted here because OAH does not have jurisdiction over them. Proposed resolutions related to those claims are also omitted.

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. Pasadena will advise Student as soon as possible of the identities (and addresses if possible) of any proposed witnesses it is no longer able to produce. 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 timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) 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) The parties shall attempt to reach agreement on a witness list for the first day of hearing. Pasadena 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 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).) At present no 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. Pasadena's motion to make an audio recording of the hearing is granted subject to the conditions below. If Student desires to make such a recording, she shall move in advance of the hearing for leave to do so, and any recording shall be 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 Pasadena.

9. Motions. At present no 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 neither party 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, or 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. At the request of Parents, the hearing will be closed to the public.

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: December 2, 2015

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings