

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. 2015071239

ORDER FOLLOWING PREHEARING
CONFERENCE

On December 4, 2014, a telephonic prehearing conference was held before Administrative Law Judge Cole Dalton, Office of Administrative Hearings. Jennifer Guze Campbell, Attorney at Law, and Maria Cazillo appeared on behalf of Student. Geoffrey Winterowd, Attorney at Law, appeared on behalf of District. The PHC was recorded.¹

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 15, 16 and 17, 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 2335 Plaza Del Amo, Torrance, CA 90509. 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.

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. § 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 shall certify that it would provide a facility for this case that complied with the law. 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.

Prior to the beginning of the hearing, District 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 District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical

¹ Student's motion to record the PHC was denied. The OAH's recording is the only official recording of the PHC.

outlet. District 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.

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

Issues:

1. Did District deny Student a free appropriate public education, by failing to provide a timely independent educational evaluation in speech and language, after agreeing to provide the evaluation in January 2015?

Proposed Resolutions:

Student seeks an order that District (1) complete a timely independent speech and language evaluation using a provider chosen by Parent, and (2) hold an IEP team meeting within 30 days of completion of the assessment.

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 if it is a Student or District exhibit (for example, “S-1, S-2, 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.

The parties shall meet and confer by no later than **5:00 p.m. on December 10, 2015**, to discuss exhibits and eliminate duplicate exhibits from the exhibit binders.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Excerpts of an audio record of an individualized education program team meeting, if any, should be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall exchange resumes and curriculum vitae not later than **5:00 p.m. on December 10, 2015.**

District shall include as part of its exhibits the school calendar(s) for the years at issue. Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), District shall serve a copy of the school calendar(s) and on Student **by 5:00 p.m., on December 10, 2015,** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

If the parties intend to rely on individualized education programs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s). Notwithstanding the requirements of Education Code section 56505, subd. (e)(7), the parties shall serve a copy of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s) on the other party **by 5:00 p.m., on December 10, 2015,** and include the documents in the binders provided for use by the witnesses and the ALJ.

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. 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 or at the prehearing conference, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. Student's counsel identified an additional witness, District employee, Rudy Delana. District agreed to take reasonable steps to produce current employee witnesses being called by Student, during Student's case in chief, upon reasonable notification of the time that such witnesses are needed.

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 meet and confer by **5:00 p.m. on December 10, 2015,** as to the schedule of witnesses and coordinate the availability and order 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 District shall have witnesses available to testify on the first day of hearing, if agreement on a witness schedule is not reached.**

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. 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 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. 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. At the PHC, neither party sought leave to present testimony telephonically. 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the hearing is granted, subject to the following conditions: 1) The recording by OAH shall be official record of the hearing; 2) The District may also audio record the hearing; 3) The audio recording(s) shall remain confidential in the same manner and to the same extent as the hearing itself; 4) No portion of the audio recording shall be played to any potential witness in the case without explicit consent from the ALJ hearing the case; 5) The recording equipment shall only be running when the hearing is "on the record" and the recording equipment shall be turned off during recesses, lunch and at any other time when the case is off the record; 6) The hearing will not be stopped or delayed at any time to accommodate the recordings or any problems with the recording equipment; 7) Only counsel for the two parties will be permitted to record the hearing; and 8) The recordings shall be disposed of when the ALJ's decision has been served.

b. Video Recording. No party, witness or anyone else present may make any video recording or may photograph 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 is the petitioning party. Accordingly, Student shall present its case-in-chief, followed by District.

9. Motions. On October 29, 2015, Student filed three motions in limine to exclude evidence from hearing. District filed oppositions to Student's motions on November 3, 2015. Student's reply brief was filed November 6, 2015.

Motion for an order excluding all witnesses from hearing, other than Parents, except while the witness is testifying. Citing California Code of Regulations, title 5, section 3082, subdivision (c)(3), and Rule 615 of the Federal Rules of Evidence, Student sought an order excluding all witnesses, other than Parent, from attending hearing except when testifying. Section 3082, gives parties the right, absent compelling circumstances to the contrary, and upon motion to the hearing officer, to have witnesses excluded from the hearing, and Rule 615 provides that, at a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Both parties referenced prior prehearing conference orders in support of their positions. Although prior OAH orders do not carry weight as precedence, they may provide persuasive guidance. (Cal. Code Regs., tit. 5, § 3085.) Rule 615 expressly provides that it does not apply to a party who is a natural person, or to an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney. The notes from the advisory committee and committee on the Judiciary for Rule 615 explain the purpose of allowing a party or representative to attend hearing, namely, to advise and consult with counsel throughout the proceeding. Further, Section 3082 does not state any explicit exceptions to its general rule providing for exclusion of witnesses, but Student did not present any instance in which it has been applied to bar the presence of any party's representative at a hearing. Therefore, although the Federal Rules of Evidence do not apply to OAH administrative proceedings, they persuasively support the proposition that neither Parents nor designated District representatives should be excluded from hearing based on their designation as testifying witnesses.

Student's motion was granted in part and denied in part. Witnesses other than Parents and District's designated representatives will be excluded from the hearing, absent a showing at the hearing of compelling circumstances to the contrary.

Motion for an order directing District witnesses not to discuss testimony with District's counsel during the course of the hearing. Citing *Kadelbach v. Amaral* (1973) 31 Cal.App.3d 815, 824 for the proposition that courts have wide discretion over the examination and cross-examination of witnesses, Student sought a broad pre-hearing order directing District witnesses not to discuss their testimony with District counsel after direct

examination, during or after cross-examination, and during recesses or breaks as deemed by the ALJ to be necessary or appropriate, to prevent improper coaching of witnesses. An ALJ at a prehearing conference, may address such matters “as shall promote the orderly and prompt conduct of the hearing” (Gov. Code, § 11511.5, subd. (b)(12)), and at hearing, may take action “to promote due process or the orderly conduct of the Hearing.” (Cal. Code Regs., tit. 1, § 1030, subd. (e)(3).) However, there are no specific administrative rules that address the issue of a witness conferring with counsel during a special education due process hearing. The issue of whether action by the hearing officer is necessary or appropriate to prevent witness coaching will depend on circumstances occurring at hearing.

Student’s motion was denied without prejudice to bringing future motions for similar relief, if supported by facts and circumstances at hearing.

Motion for an order allowing Student to question District’s expert witnesses about their communications with District and District counsel. Citing California Code of Civil Procedure, section 2034 and Federal Rules of Civil Procedure, Rule 26, Student sought an order allowing Student’s counsel to question District’s expert witnesses regarding their communications with District personnel and District counsel, contending that the work product doctrine and attorney-client privilege are waived once experts are designated to testify at hearing. Specifically, Student seeks to ask questions regarding compensation, facts or data provided by District counsel and considered by the expert, and any assumptions provided by District counsel to the expert that were used in forming the basis of the expert’s opinions. District did not oppose questioning of its expert witnesses on the bases for their opinions and conclusions. However, District argued the attorney-client privilege attaches to communications between District counsel and District employee-experts who acted as consultants in preparing the case and percipient witnesses to certain events involved in the case. The issue of whether District may appropriately object at hearing to Student cross-examination on grounds of attorney-client privilege or the attorney work product doctrine will depend upon the witness testifying, and the specific direct examination questions and answers, cross examination questions, and objections, and is not an appropriate subject for a blanket order in advance of hearing.

Student’s motion was denied without prejudice to asserting similar arguments in response to District objections at hearing.

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 December 4, 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 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. A Spanish language interpreter is required. No other accommodations have been requested.

A 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>

14. Hearing Open/Closed To the Public. At the request of Student, 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: December 04, 2015

/s/

COLE DALTON
Administrative Law Judge
Office of Administrative Hearings