

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

OAH Case No. 2015080359

ORDER FOLLOWING PREHEARING
CONFERENCE AND DENYING
REQUEST TO CONTINUE
PREHEARING CONFERENCE

On December 7, 2015, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Susan E. Foley, Attorney at Law, appeared on behalf of Parents and Student. Eliza J. McArthur, Attorney at Law, appeared on behalf of San Jose 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 at San Jose's District Offices located at 855 Lenzen Avenue, Suite 218, San Jose, California, 95126, on December 15 - 17, and 22, 2015, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of hearing and on December 22, 2015, 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.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 has not yet certified that it will provide a facility for this case that complies with the law. **The local educational agency shall inform OAH within two days of the date of this order that it is able to certify that it will provide a facility that complies with the law and file that certification with OAH.**

Prior to the beginning of the hearing, San Jose 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 outlet. San Jose shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses and the ALJ. All efforts shall be made to ensure that the same hearing room will be used for each day of hearing. The hearing room shall be available

at least one hour prior to the commencement of the hearing each day, and 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 issue for the due process hearing and the proposed resolutions were discussed and clarified during the PHC and are listed below.

Issue One: For the 2014-2015 and 2015-2016 school years, did San Jose deny Student a free appropriate public education through its individualized education program offers dated June 3, 2014, and May 21, 2015, by failing to offer an IEP that met Student's unique educational needs as follows:¹

- (a) failing to offer a classroom with a low teacher-to-student ratio of not more than one teacher per one student allowing for one-on-one academic instruction;
- (b) failing to offer any direct occupational therapy services and failing to offer adequate occupational therapy consultation time to address gross and fine motor deficits;
- (c) failing to offer adequate individual speech-language therapy in terms of frequency and duration; and
- (d) failing to offer physical therapy to address Student's gross motor deficits and her ability to navigate the offered comprehensive campus?

Proposed Resolutions: San Jose to provide: 1) an educational placement with a one to-one teacher-student ratio; 2) two 30-minute sessions per week of individual speech-language therapy and 30 minutes per week of pragmatic-language therapy session; 3) one 45-minute session per week of individual occupational therapy; 4) 60 minutes per week of individual physical therapy; and 5) reimbursement for all educational costs from the start of the 2014-2015 school year.

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-5, S-6, or D-1, D-2"). Each exhibit shall be internally paginated by

¹ During the PHC, Student indicated that Issue 1(a) in her PHC statement, regarding San Jose's alleged failure to offer a small campus, was not identified as an issue in her complaint and withdrew this proposed issue.

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.

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 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. San Jose agreed to make district employees available for hearing. 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 timely disclosed except for good cause shown, and at the discretion of the ALJ.

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. Student has identified approximately 7 witnesses.² San Jose has identified 15 witnesses, some of whom are shared witnesses. Given the allotted hearing time of four days, the parties are ordered to meet and confer by December 9, 2015, as to the schedule of witnesses and the projected length of direct and cross examination.

At the start of the hearing, the parties shall present a proposed joint schedule of witnesses for the entire hearing, with time estimates. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony, to ensure that this matter is concluded within the time allotted, based upon the parties' time estimates as well as on the issues presented.

5. Order of Presentation of Evidence and Scope of Witness Examination. 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 has the burden of proof. Student shall present her evidence first, followed by San Jose. 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

² Student represented that she filed a PHC statement on December 4, 2015, which superseded her original PHC statement filed on September 21, 2015. The ALJ had not received a copy of this PHC statement prior to the PHC. Student shall re-fax her December 4, 2015 PHC statement to OAH.

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. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party requested telephonic testimony at this time, although San Jose may submit a motion for telephonic testimony prior to hearing.

7. Electronic Recording of Hearing.

a. Audio Recording. San Jose's motion to make an audio recording of the hearing is granted, and Student is also authorized to audio record the hearing 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. Motions. At the start of the PHC, Student requested a continuance of the PHC only as she believes the parties are close to a settlement. San Jose did not oppose the motion.

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); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Student did not establish good cause for a continuance of the PHC only. The next available PHC date of December 11, 2015, would not allow sufficient time in advance of the hearing date of December 15, 2015, for an effective PHC. Student did not ask to continue the hearing dates and represented she did not have good cause for such a request.

Student does not anticipate filing any pretrial motions. San Jose indicated that it may file a motion for telephonic testimony. No other pretrial motions are pending or contemplated. Any other 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 7, 2015.

9. 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.

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. Special Needs and Accommodations. 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>.

13. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

14. 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.

15. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: December 7, 2015

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings