

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LAMMERSVILLE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2019020438

ORDER FOLLOWING PREHEARING
CONFERENCE AND DENYING
MOTION TO CONSOLIDATE AND
FOR CONTINUANCE

On March 29, 2019, a telephonic prehearing conference was held before Administrative Law Judge Penelope Pahl, Office of Administrative Hearings. James Sibley, Attorney at Law, appeared on behalf of Student. Aimee Perry and Michelle Sliwa, Attorneys at Law, appeared on behalf of Lammersville Unified School District. The PHC was recorded.

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

1. Motion to Consolidate and for Continuance. Lammersville filed a request for due process hearing on March 26, 2019. On March 29, 2019, the date of the 1:00 p.m. Prehearing Conference, Lammersville filed a motion to consolidate and accompanying request to continue the consolidated matters at 12:26 p.m. The motion was not accompanied by a declaration explaining the late filing of the motion or providing good cause for continuing the hearing. Counsel for Student objected to the late filing of the motions and to any delay of the hearing.

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: a common question of law and/or fact; 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); Code of Civ. Proc., § 1048, subd. (a).) However, all prehearing motions are ordered to be filed three business days prior to the Prehearing Conference. When a motion is not filed by the prescribed deadline, it must be accompanied by a declaration detailing the reason why the motion was not timely filed.

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).)

In this case, Lammersville could have filed their motion to consolidate and request for continuance when their request for due process hearing was filed on March 26, 2019. The motion would have been timely and provided an opportunity for written opposition. Although Lammersville argues that it could not have filed a motion prior to March 29 because it just received the scheduling order for its case on March 28, 2019, Lammersville was aware that their case would not be scheduled for the same dates set for Student's case. Thus filing the request for consolidation and continuance was neither impacted nor driven by the dates mandated by the scheduling order. Furthermore, Student's case has been on file since February 11, 2019. Nothing prevented Lammersville from filing their request for due process prior to the week scheduled for the Prehearing Conference in Student's case, allowing consolidation of the cases to be considered earlier and Prehearing Conferences to be combined. In these circumstances, there was no notice of a request for consolidation that allowed the possibility of holding a prehearing conference for both cases during the PHC scheduled for Student's case.

Lammersville offered no good cause for continuing the hearing. Although Lammersville stated that its special education director, Mr. Saylor was traveling, and asked for a continuance to allow additional time for settlement negotiations, this does not constitute good cause for a continuance. Nothing prevents the parties from discussing settlement between the time Mr. Saylor returns on April 1, 2019 and the time of the hearing on April 9, 2019 and the parties are encouraged to do so. Both the request to consolidate and the request for continuance are denied.

2. Hearing Dates, Times, and Location. The hearing shall take place on April 9, 2019 at 9:30 a.m., and April 10 and 11, 2019 at 9:00 a.m., then continuing day to day at the discretion of the ALJ. The hearing is currently scheduled to take place at Lammersville Unified School District, 111 South De Anza Boulevard, Mountain House, CA 95391. Counsel for Lammersville stated that the district may ask to change the hearing location as the district offices are small; however, changing venue requires the participation of Mr. Saylor. **Lammersville is ordered to file a request to change the location no later than Wednesday April 3, 2019, accompanied by a Certification of ADA compliance, designating whether the parties stipulate to the change. If no stipulation is obtained, Student must file any opposition by noon on Thursday April 4, 2019.**

As ordered in the scheduling order, 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. District shall inform OAH within two days of the date of this

order if it is unable to comply with this order.

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.

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 must be capable of being locked during breaks, lunch and overnight for the duration of the hearing.

3. Issues and Proposed Resolutions. Pursuant to discussions with the parties during the prehearing conference, the issues to be determined at the due process hearing, and the proposed resolutions, are listed below:

Issue¹

1.The District failed to provide Student a FAPE during the 2017-2018 academic year by failing to provide appropriate ESY services.

2.The District failed to provide Student a FAPE during the 2018-2019 academic year by:

a. Failing to provide assessments in all areas of suspected disability, specifically, the areas of behavioral, health, adapted physical education, and physical therapy;

b. Failing to provide appropriate health and nursing services to address Student’s unique healthcare needs;

¹ The ALJ has reworded, numbered (instead of lettered) and clarified some issues as stated in Student’s prehearing conference statement as allowed by the holdings in *J.W. v. Fresno Unified Sch. Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443, and *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1090. (But see *M.C. v. Antelope Valley Union High Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1196, fn. 2 [dictum].) If either party believes the issues as clarified do not adequately capture the issues as raised in the complaint and clarified during the PHC, that party is to swiftly notify OAH in writing prior to hearing regarding any discrepancy. Any concerns regarding the wording of issues will be addressed at the outset of the hearing.

- c. Failing to provide appropriate behavioral services to address Student's unique behavioral needs;
- d. Failing to provide appropriate transportation services to address Student's unique transportation and health-related needs;
- e. Failing to provide APE services to address Student's unique physical education-related needs;
- f. Failing to provide appropriate physical therapy services to address Student's unique physical therapy-related needs;
- g. Failing to provide an appropriate educational placement;
- h. Failing to consider private assessments at the July 30, 2018, IEP meeting.

3.The District committed various procedural violations which prevented meaningful participation and deprived Student of an educational benefit including:

- a. Failing to have the essential members of the IEP team present for the May 31, 2018, June 14, 2018, and July 30, 2018, Annual IEP meetings.
- b. Failing to provide prior written notice after denying Parent's request for appropriate behavioral services at the July 30, 2018, IEP meeting.
- c. Failing to provide prior written notice after denying Parent's request for appropriate transportation services at the July 30, 2018, IEP meeting. (~~Ed. Code § 56500.4(a).~~);
- d. Failing to provide PWN after denying Parent's request for additional nursing services at the July 30, 2018, IEP meeting. (~~Ed. Code § 56500.4(a).~~);
- e. Predetermining Student's placement prior to the July 30, 2018, IEP eligibility meeting.

Proposed Resolutions:

As proposed resolutions to the issues alleged, Student seeks funding for an intensive home based program including special education support services or placement in an appropriate non-public school for the 2019-2020 school year; independent educational assessment in the areas of behavior, physical therapy, adaptive physical education and health. Student also seeks compensatory education in the areas of academics, occupational therapy, physical therapy, speech and language, behavior, extended school year services and transportation as well as reimbursement for all education and related transportation expenses for Student's education and educationally related need expended by Parents. Additionally,

Student seeks an order requiring staff training regarding the IDEA. Student also requests that the District pay Student's attorneys' fees and costs.

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 Bates-stamped with consecutive bates stamping of exhibits preferred. 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.

Parties are encouraged to present resumes or curriculum vitae for each professional witness.

Lammersville shall include a color copy of the school calendar for each school year in question and shall have witnesses available to testify as to any legend notations that might be unique to Lammersville. Lammersville shall also provide an academic calendar for County education program being recommended as part of Student's IEP.

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 timely disclosed except for good cause shown, and at the discretion of the ALJ.

6. Meet and Confer. The parties are encouraged to review and shorten their witness lists and lists of Exhibits 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. To that end, **parties are ordered to meet and confer no later than 3 p.m. April 4, 2019**, to discuss whether routine information can be the subject of stipulations to shorten the hearing by avoiding the necessity of testimony, particularly as to routine matters, and/or exhibits. The parties shall also discuss the order of witnesses and the length of witness testimony and be prepared to present the ALJ with a written joint witness list with a schedule that includes time estimates and dates of expected testimony for each witness to be called. This schedule shall be provided on the first day of hearing.

Should agreement on a witness list not be reached, each party shall prepare separate schedules and Student shall have witnesses available so the hearing can proceed promptly. 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.

7. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

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, bears the burden of proof, and shall present his case-in-chief first, followed by District.

9. Telephonic /Video Testimony. Lammersville has requested that Dr. Howard Taras testify by telephone. No object was received from Student. Whether a witness may appear by telephone or other electronic means 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 or video conference shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone or video conference.

Lammersville 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 instruct the witness as to the rules regarding maintenance of Student's privacy with regard to the documents provided. Lammersville of the testimony shall also ensure that the room from which the witness is testifying has telephone and video equipment that allows all hearing participants to hear and, if applicable, see the witness, and that the witness is able to hear objections and rulings. Lammersville shall ensure that the hearing room is equipped with adequate telephonic or video conferencing equipment that allows receipt of the transmitted telephonic or video testimony. Video conferencing will be allowed only if adequate equipment is available and the ability to transmit the necessary signal is reliable. Should video conferencing become burdensome or time consuming, the testimony shall proceed via telephone. To that end, Lammersville shall ensure that adequate telephone conferencing equipment is available to both their witness and in the hearing room. No witness will be heard by telephone or video conference unless all these requirements have been fulfilled.

10. Electronic Recording of Hearing.

a. Audio Recording. The parties' motions to make an audio recording of the hearing is granted, 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; 3) the recording device will be removed by the party recording during any recess where the party leaves the room; 4) that operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a private recording is not allowed to be used to prepare the testimony of an upcoming witness in 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.

11. IEP Recordings. Any request to introduce a portion of an IEP recording will be considered at the time of hearing subject to the following conditions: 1) It is preferable that a transcript **of the portion of the IEP recording being introduced** be prepared and submitted with a declaration authenticating the transcription; 2) At the time the evidence is introduced, the relevance of the portion of the IEP recording at issue must be established; 3) the exact portion (minutes) of the IEP recording the party seeks to admit must be identified; and 4) the person speaking on the portion of the tape being introduced must be established.

An opposing party is not precluded from seeking admission of additional portions of an IEP recording to establish additional context of comments subject to the above requirements.

Parties are not precluded from seeking admission of an entire IEP recording subject to establishment of relevance of the entire recording as well as meeting the other requirements listed above.

12. Motions. Other than a possible request to change the location of the hearing, no other motions are anticipated. Any future motions shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not filed three days prior to the Prehearing Conference as required by the scheduling order.

13. 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.

14. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged to promote hearing efficiency. Stipulations to routine foundational facts and avoiding duplicative exhibits are particularly favored. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

15. 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.

16. Special Needs Accommodations and Translation. At present neither party anticipates the need for accommodation for any witness or party, or for the services of an interpreter. Any party or participant to this case 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/Accessibility.aspx>.

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

18. 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 **EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT <https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb>** . IF THE SETTLEMENT IS SUBJECT TO BOARD APPROVAL, THE LETTER SHALL CONTAIN THE DATE ON WHICH THE BOARD IS SCHEDULED TO CONSIDER THE SETTLEMENT AGREEMENT.

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.

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

IT IS SO ORDERED.

DATE: April 2, 2019

DocuSigned by:
Penelope S. Pahl
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PENELOPE S. PAHL
Administrative Law Judge
Office of Administrative Hearings