BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CORONADO UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016080463
CORONADO UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2016060392 ORDER FOLLOWING PREHEARING CONFERENCE AND DENYING STUDENT'S MOTION TO FILE A SECOND AMENDED COMPLAINT

On April 17, 2017, a telephonic prehearing conference was held before Administrative Law Judge Adrienne L. Krikorian, Office of Administrative Hearings. Lauren Ashley Caron, Attorney at Law, appeared on behalf of Student. Sundee Johnson, Attorney at Law, appeared on behalf of 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 April 26, 27, May 2, 3, and 4, and May 9, 2017, 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 201 Sixth Street, Coronado, California 92118. 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, the named local educational agency was to 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 failed to 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 outlet. District shall also make reasonable effort to ensure that parking, drinking water and tissue are available 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 based upon discussion of the parties.

Student's Issues:

1. Did District deny Student a free appropriate public education by failing without unreasonable delay to either file a due process complaint to defend its February 2016 multidisciplinary psychoeducational triennial evaluation and speech and language assessment, or fund independent educational evaluations at public expense?

2. Did District deny Student a FAPE by failing to make an appropriate offer of placement and related services to address his unique needs in behavior, social skills, speech and language, fine and gross motor, and academics in Student's:

a. March 5, 2015 individualized education program;

b. April 16, 2015 IEP;

c. September 10, 2015 IEP;

d. September 16, 2015 IEP;

e. October 9, 2015 IEP;

f. October 27, 2015 IEP;

g. January 4, 2016 IEP;

h. February 4, 2016 IEP;

i. March 24, 2016 IEP; and

j. May 24, 2016 IEP.

Student's complaint proposes the following resolutions:

a. A finding that each of the IEP's developed between March 5, 2015 and May 24, 2016 are inappropriate;

b. Reimbursement for parent provided related services, independent evaluations, and tuition and transportation reimbursement for Camp Lee Mar for the summers of 2015 and 2016;

c. District funded placement and related services at a certified residential treatment center, including transportation;

d. Compensatory education; and

e. Independent educational evaluation in speech and language.

District's Issue:

Were District's March 20, 2016 academic and occupational therapy assessments of Student appropriate such that Student is not entitled to independent educational evaluations in those areas at public expense?

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Except as permitted in this order or otherwise ordered by the ALJ, 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. Each exhibit binder shall contain a detailed table of contents.

Emails consisting of a chain of emails responding to an initial email may be included in a single exhibit. Otherwise, each exhibit, including miscellaneous emails, shall consist of one document; separate documents may not be combined into one exhibit. Documents offered for the purpose of proving claims for reimbursement shall be organized by provider, and chronological from first to last date of service.

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. 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).

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, subdivision (e)(7), the parties shall exchange resumes and curriculum vitae not later than 24 hours before the witness is scheduled to testify.

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, subdivision (e)(7), District shall serve a copy of the school calendar(s) and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ not later than the first day of hearing.

If the parties intend to rely on IEP's, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and all typewritten or handwritten notes or comments, if any, written on the IEP(s). Excerpts of an audio record of an IEP team meeting, if any, should, in addition to the audio record offered, be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party along with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcriptions need not be prepared by a certified court reporter.

The parties shall meet and confer before the close of business on **April 24, 2017**, in order to delete duplicate exhibits from the exhibit binders and to consolidate exhibits where possible. The parties are not required to renumber exhibits if exhibits are removed from their binders.

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 shall not serve exhibits on OAH prior to the hearing.

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 except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer before close of business on **April 24, 2017**, as to the schedule of witnesses. On the first day of hearing, the parties shall provide the ALJ with a detailed hour by hour witness schedule which shall include an estimate of

time for each side's direct and cross examination for the entire hearing. The District shall have witnesses available in case agreement on a witness list is not reached. 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.

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.

If any witness identified by Student was but no longer is a District employee or under District's control, District shall provide Student's attorney with the last known address of the witness. Student shall use the information solely for the purpose of procuring the attendance of the witness at hearing by subpoena, and shall not publish or otherwise share the information except for that purpose. Alternatively, District shall cooperate with Student to make the witness available for hearing.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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. 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 with all of each party's exhibits prior to the hearing. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present using a "land-line" 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.

Student's request for permission for two out-of-state witnesses, one from Camp Lee Mar and the other from Monarch Center for Autism, to testify telephonically is granted. Student shall identify the names of those witnesses in accordance with Education Code section 56505, subdivision (e)(7). Student shall provide each approved witness with a complete and legible hard copy of the exhibit binder from each party, containing all of each

party's exhibits, prior to the hearing. The witness shall testify from a location that is private with no other individuals present or within hearing distance. District shall ensure that the hearing room has sound equipment that allows everyone in the room to clearly hear the witness.

7. Electronic Recording of Hearing.

a. Audio Recording. Either party may make an audio recording of the hearing as a courtesy and subject to the following conditions: 1) OAH's recording is the only official recording; 2) 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) operation of the party's recording mechanism will not be allowed to delay the hearing; 4) the recording shall not be played or published for a prospective witness; 5) the recording shall not be used for any purpose other than assisting in the representation and presentation of this due process hearing; 6) the parties shall erase, or otherwise destroy, the recording after the hearing and all opportunities for appeal from any decision herein has been exhausted; and 7) the parties shall not use this recording in any subsequent due process 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, District is the petitioning party in District's case, and Student is the petitioning party in Student's case. The parties agreed that Student shall present its case-in-chief, followed by District, subject to paragraph 5 of this Order.

9. Motions.

Motion to Amend: On April 17, 2017, Student filed a motion to file a second amended complaint shortly before the PHC. District informed the ALJ on the record during the PHC that it did not oppose the motion. The ALJ heard oral argument from both parties in support of the motion. **For the reasons discussed below, Student's motion to amend is denied.**

District filed its due process complaint naming Parent in OAH case number 2016060392 on June 2, 2016. On July 29, 2016, Student filed a due process complaint naming District in OAH case number 2016080463. District filed a response to Student's complaint on August 8, 2016. On August 29, 2016, OAH granted a joint motion to consolidate Student's case with District's case, and made Student's case primary. The hearing in the consolidated matter was continued to December 6, 2016. On November 22, 2016, Student filed a first amended complaint, which OAH treated as a motion to amend. On November 28, 2016, OAH held a PHC in the consolidated matter and granted Student's

motion to amend his complaint. All hearing dates in the consolidated matters were vacated. OAH issued a new scheduling order on November 29, 2016, setting the due process hearing in the consolidated matters for January 24, 2017. On January 9, 2017, the parties filed a joint motion to continue the consolidated matters, which OAH granted on the same date. The hearing was continued to the currently-scheduled date of April 26, 2017. **The presiding ALJ also ordered that no further continuances or amendments to Student's complaint would be granted.**

The Code of Federal Regulations (34 C.F.R. § 300.515) sets forth the timeline for issuance of a final decision in a special education due process proceeding:

> (a) The public agency must ensure that not later than 45 days after the expiration of the 30-day period under § 300.510(b) [resolution period], or the adjusted time periods described in § 300.510(c) — (1) A final decision is reached in the hearing; and (2) A copy of the decision is mailed to each of the parties.
> . . .
> (c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

The process of amending a due process complaint is set forth in 20 United States Code, section 1415, at subsection (c)(2)(E):

> (E) Amended complaint notice
>
> (i) In general. A party *may amend* its due process complaint notice only if—
>
> (I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or
>
> (II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.
>
> (ii) Applicable timeline. The applicable timeline for a due process hearing under this subchapter *shall recommence* at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).
>
> (Emphasis added.)

The state statutes and regulations regarding the due process timeline and amendment of a due process complaint mirror the federal language.

Discussion

The IDEA's amendment statute and regulations do not mandate OAH to permit the filing of an amended pleading whenever the other party consents. Title 20 United States Code section 1415, subsection (c)(2)(E), provides two means by which a Student "may amend" the due process complaint: by written consent of the respondent or by permission (order) of the administrative law judge. The first option contemplates agreement of the parties to amend while the second option empowers the ALJ to order an amendment, whether or not the other party agrees.

Title 20 United States Code section 1415, subsection (c)(2)(E)(i), contains no language mandating the filing of an amended pleading when the other party consents in writing. Congress employs "shall" in subsection (c)(2)(E)(ii) (the due process time "shall recommence") of the same subsection. Assumedly, if Congress intended OAH not to have any discretion, it would have similarly used the mandatory "shall" in the previous sentence. Congress did not.

The IDEA is designed for expedient resolution of disputes in due process hearing proceedings. The federal regulations specify that OAH "must ensure" the issuance of a decision following a due process hearing just 45 days after the resolution period ends. (34 C.F.R. § 300.515, subsection (a)). The only exception to the 45-day timeline is in subsection (c), which empowers the ALJ to grant specific extensions of time for good cause. Therefore, the guiding statutes and regulations controlling the due process hearing timeline are subject to the discretion of the ALJ. Interpreting any other section of the IDEA which removes such discretion is inconsistent with the timeline mandate.

Student filed his second amended complaint despite OAH's January 9, 2017 ruling that no further amendments or continuances would be granted. Student argued, in part that the second amended complaint addressed a recent IEP meeting held on April 13, 2017.[1] Both parties argued that the issues in the second amended complaint would involve the same witnesses and evidence and that granting the amendment would afford the parties the opportunity to participate in a resolution session and mediation encompassing all issues before hearing. They also argued that the placement that District offered at the April 13, 2017 IEP, might, if litigated separately, result in conflicting remedies with the instant matter.

[1] It also added issues regarding (1) District's failure to timely file for due process to defend its IEP on March 24, 2016 and May 24, 2016, (2) failure to convene an IEP team meeting responding to Student's November 17, 2016 request for an IEP meeting, and (3) failing to consider student's private neuropsychological assessment dated November 16, 2016, as amended on February 21, 2017.

Neither party addressed the January 9, 2017 order denying any further continuances or amendments or explained why that ruling should be disregarded.

A petitioner's unfettered entitlement to file an amended pleading, whenever the other party consents, leads to a logical absurdity. Here, Student has amended once and seeks to amend again for purposes of adding allegations about District's IEP offer after the first amended complaint was filed, and District's failure to act before the first amended complaint was filed. If a party is summarily entitled to amend with each subsequent IEP, a due process hearing can be delayed for years, undermining IDEA's public policy of expeditious and timely resolution of disputes. Congress did not contemplate such an incongruity. Therefore, OAH retains discretion to deny the filing of an amended pleading, even if consented to, when the hearing would otherwise be unreasonably delayed. This is consistent with the IDEA's policy of prompt resolution of questions involving a disabled student's education.

District's case was filed in June 2016; Student original complaint has been pending since the end of July 2016. The consolidated matters matter are presently scheduled for hearing on April 26, 2017, having already been continued since Student filed his first amended complaint in November 2016. Student seeks to again amend his complaint which would delay the hearing for at least 45 days. If the second amended complaint is filed, a new scheduling order would issue setting a hearing in early June 2017, one year after the filing of District's case and ten months after the initial filing of Student's complaint. Such delay is unacceptable. Both parties are bound to diligently prosecute their due process complaints to hearing. The motion to file a second amended complaint is therefore denied.

Proposed Motion to Consolidate: Student represented during the PHC that it may file a new complaint and a motion to consolidate the new complaint with this consolidated matter. Any motion to consolidate a new matter with this consolidated matter shall take into consideration the January 9, 2017 Order and this Order regarding delaying this matter any further. 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 April 17, 2017.

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 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing 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.

If the parties settle the matter subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall submit a request for a status conference and provide the date of the next board meeting. OAH will not cancel the hearing dates without this information.

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

IT IS SO ORDERED.

DATE: April 17, 2017

DocuSigned by:
Adrienne L. Krikorian
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ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings