BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018101229 ORDER FOLLOWING PREHEARING CONFERENCE

On December 7, 2018, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Daniel Shaw, Attorney at Law, appeared on behalf of Student. David Mishook, Attorney at Law, appeared on behalf of San Luis Coastal Unified School District. The PHC was recorded.

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

1. Student's Motion to Compel San Luis to Respond to Complaint and Motion to Shift Costs. On December 4, 2018, Student filed a motion to compel San Luis to respond to his request for due process hearing (complaint). He also asked for an order from OAH that San Luis pay his costs for filing the motion. He did not include a sworn declaration with his motion to establish that he had not received a response, and to substantiate his costs. San Luis did not file a response to the motion.

Motion to Compel

The Individuals with Disabilities Education Act, in 20 U.S.C. section 1415, subdivision (b)(3) requires a local educational agency to provide a parent with prior written notice when it proposes or refuses to take action concerning a student with a disability. Subdivision (c)(1) of section 1415 describes the required contents of the prior written notice. If a parent then files a complaint regarding the proposal or refusal of a local educational agency to take action concerning a student with a disability, and it has not previously provided the parent with prior written notice concerning the claims in the complaint, subdivision (c)(2)(B) of section 1415 requires the local educational agency to send to the parent a response to the complaint which contains the information specified in subdivision (c)(2)(B)(aa)-(dd). This response must be sent to the parent within 10 days of the filing of the complaint. (20 U.S.C. § 1415(c)(2)(B).)

In *M.C. v. Antelope Valley Union High School District* (9th Cir. 2017) 858 F.3d 1189, 1199, (*Antelope Valley*) the court ruled that failure of a local educational agency to provide a response to a parent's complaint, under any circumstances, should prevent a hearing from going forward. The court reasoned that a response was necessary to assist the student to prepare for the due process hearing, and was especially necessary in hearings pursuant to the IDEA because there is no pre-hearing discovery.

In his motion to compel a response Student echoed the holding in *Antelope Valley* and claimed that he was "prejudiced," and that the absence of a response denied him "a fair hearing." Counsel for San Luis orally responded to the motion at the beginning of the PHC and stated that it had sent Student its response on December 5, 2018. The ALJ offered to continue the hearing because the response had been sent to Student more than 10 days after he filed his complaint, and therefore might have hindered his preparation for hearing. However, Student's counsel insisted that the hearing go forward on the date currently scheduled, December 20, 2018.

Counsel for Student acknowledged receiving the response, but argued that the response was not filed with OAH. However, there is no requirement that the response be filed with OAH, only that the response be sent to parents. Counsel for Student then stated that the response was not legally compliant. However, the ALJ could not make any ruling in that regard because San Luis did not file the response with OAH so she could not review the response, and because Student did not furnish a copy either.[1] The ALJ advised Student's counsel that if Student wished to file a written motion that OAH find the response legally noncompliant, he could do so, and the motion would be ruled on at the beginning of the hearing.

Motion to Shift Costs

An ALJ presiding over a hearing may "order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (Gov. Code, § 11455.30, subd. (a); Cal. Code. Regs., tit. 5, § 3088, subd. (a).) An order to pay expenses is enforceable in the same manner as a money judgment or by seeking a contempt of court order. (Gov. Code, § 11455.30, subd. (b).)

"Actions or tactics" is defined as including, but not limited to, making or opposing motions or filing and serving a complaint. (Gov. Code, §11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(1).) "Frivolous" means totally and completely without merit or for

[1] The response was filed with OAH after the end of the PHC.

the sole purpose of harassing an opposing party. (Gov. Code, § 11455.30, subd. (a); Code Civ. Proc., § 128.5, subd. (b)(2).) "Whether an action is frivolous is governed by an objective standard: any reasonable attorney would agree it is totally and completely without merit [citations]." (*Levy v. Blum* (2001) 92 Cal.App.4th 625, 635.) In addition, there must be a showing of improper purpose. (*Ibid*.) A finding of "bad faith" does not require a determination of evil motive. (*West Coast Development v. Reed* (1992) 2 Cal.App.4th 693, 702.)

San Luis sent its response to Student more than 10 days after he filed his complaint on October 26, 2018. As noted above, the ALJ offered Student a continuance if the lateness of the response might have hindered Student's preparation of the case for hearing, but he declined.

Student did not have a supporting declaration with his motion which could have established as a fact that he had not been sent a response within 10 days of the filing of the complaint, and could also have established the amount of costs to be shifted. Further, when asked by the ALJ if he had contacted San Luis's counsel shortly after the 10-day response period had ended to inform them he had not received a response and to see if the response had been lost in transit, he responded that he had not done so. He did not need to do so, he claimed, because the law firm representing San Luis has a history of not sending responses to complaints.

Student's motion to shift costs is denied because he failed to file a supporting declaration to establish that a response had not been sent, and to establish the amount of costs to be shifted. Further, there was no showing of bad faith on the part of San Luis since counsel for Student admitted he had not contacted it once he realized the response was late, and he then waited until December 4, 2018, 29 days after the response was due, to file the motion to compel. In the future, if counsel for Student might cure such a problem with a telephone call before making a motion for sanctions, he is encouraged to do so. Student is not precluded from making a motion to shift costs as it relates to a motion that the response is not legally compliant.[2]

2. Hearing Dates, Times, and Location. The hearing shall begin on December 20, 2018, at 1500 Lizzie Street, G-1, San Luis Obispo, California 93401, at 9:30 a.m. The hearing shall continue on December 21, 2018, at 9:00 a.m.[3] Additional dates for hearing, if

[2] During the PHC the ALJ granted Student's request that the motion to shift costs be denied without prejudice. However, she did so with the belief that Student was making the request that it be denied without prejudice because he intended to file another motion to shift costs if he filed a motion to argue that the response was not legally compliant.

[3] Mr. Mishook appeared for the PHC in place of Jan Tomsky, another attorney from his office. He was able to confirm that the hearing was on her calendar for December 20, 2018, but he could not confirm her availability on December 21, 2018. Ms. Tomsky may file a motion to vacate December 21, 2018, if there is good cause to do so.

necessary, shall be determined on the first day of hearing. OAH does not routinely schedule hearings on a Friday. However, the undersigned ALJ is willing to conduct the hearing on December 21, 2018. If another ALJ is assigned to the hearing, that judge may not be willing or able to conduct the hearing on December 21, 2018, and the parties were so advised during the PHC. During the PHC the parties also discussed the fact that although there is a preference that hearings continue day to day, week to week, this may not be possible due to the holidays in the two weeks following the hearing and resulting unavailability of witnesses and counsel.

As ordered in the scheduling order, San Luis was to 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. San Luis has certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, San Luis 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 San Luis'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 Luis shall make every effort to have another room available for Student's representatives to meet and confer when the hearing is not in session. San Luis 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 at lunch and following the hearing each night. San Luis shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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.

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

Issues

1) Did San Luis deny Student a free appropriate public education from October 27, 2016, to the end of the 2016-2017 school year, including extended school year, by:

a. failing to assess Student in all areas of suspected disability, specifically by not conducting a functional behavior assessment, an assistive technology assessment, an academic assessment, and an assessment of his cognition;

b. failing to provide him with appropriate behavior supports, specifically a behavior intervention plan and the services of a board certified behavior analyst to address his school attendance;

c. failing to offer or provide him appropriate mental health services, specifically daily counseling and mental health services to address his school avoidance;

d. failing to implement his individualized education program by providing services to ensure school attendance so that he could receive the services that were offered in his IEP;

e. failing to conduct an appropriate mental health assessment;

f. predetermining his mental health services;

g. failing to offer an appropriate transition plan;

h. failing to offer or provide him with appropriate goals in all areas of need, specifically reading decoding, reading fluency, and school attendance; and

i. failing to offer appropriate extended school year services to address his attendance, behavior and mental health needs?

2) For the 2017-2018 school year, including extended school year, to the present[4] did San Luis deny Student a FAPE by:

a. failing to assess him in all areas of suspected disability, specifically by not conducting a functional behavior assessment, an assistive technology assessment, an academic assessment, and an assessment of his cognition;

b. failing to offer or provide him with appropriate be behavior supports, specifically a behavior intervention plan and the services of a board certified behavior analyst to address his school attendance;

c. failing to conduct a timely triennial assessment;

d. failing to offer or provide him appropriate mental health services, specifically daily counseling and mental health services to address his school avoidance;

[4] At the beginning of the due process hearing the parties shall be prepared to discuss whether this issue encompasses the current school year up to the date of the filing of the complaint, or beyond that date.

e. failing to implement his IEP by providing services to ensure school attendance so that he could receive the services that were offered in his IEP;

f. failing to offer an appropriate transition plan;[5]

g. failing to offer him an appropriate placement, specifically placement in a small school setting (akin to a day treatment program) where he could not avoid school; and

h. failing to offer or provide him with appropriate goals in all areas of need, specifically reading comprehension, reading fluency, reading decoding, and school attendance?

Proposed Resolutions

1) OAH find that Student prevailed on all issues.

2) San Luis shall be ordered to provide compensatory education in the areas of academic tutoring, behavior, and mental health in accordance with proof at hearing.

3) San Luis shall be ordered to provide independent assessments in the areas of behavior, psychoeducation (including cognitive testing), assistive technology, and mental health.

4) San Luis shall offer Student an IEP with an appropriate placement (i.e. a residential placement) in accordance with proof at hearing.

5) San Luis shall conduct a training for all special education staff on assessing students in all areas of suspected disability. The training shall focus on the importance of conducting functional behavior assessments to address school avoidance.

6) San Luis shall provide Student with such other and further relief, which is unknown to him at this time, as deemed appropriate by the ALJ.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Each exhibit shall be separated from the rest by a numbered, tabbed index page. 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, or a party's exhibit binder shall be consecutively paginated or Bates-stamped. Each exhibit binder shall

[5] This subissue was 1g in the complaint, but Student withdrew the subissue in his complaint that was 1f, so the subissues have been re-lettered in this order.

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.

Resumes or curriculum vitae for witnesses testifying in their professional capacity are encouraged but not ordered to be produced. The parties understand that these documents may not be available until the witness testifies and agree that they need not be exchanged in accordance with Education Code section 56505, subdivision (e)(7).

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.

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 attempt to reach agreement on a witness list for the hearing, and shall meet and confer to do so no later than close of business on December 11, 2018. Student 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.

6. 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.

7. 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.

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 anticipates the need for a witness to testify telephonically.

8. Electronic Recording of Hearing.

a. Audio Recording. Student intends to record the hearing. San Luis understands it shall inform the ALJ if it intends to do so. The following conditions apply for a party recording the hearing: 1) OAH's recording is the only official recording; 2) the recorder will be turned on and off at the same time as the ALJ's recorder, in order to avoid recording conversations while off the record; 3) the recording device will be removed by the recording party during any recess where the party leaves the room; 4) the operation of the party's recording mechanism will not be allowed to delay the hearing; and 5) a party recording the hearing may not play the recording of a witness's testimony to another witness who has not yet testified.

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.

9. 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 has the burden of proof and shall present his case-in-chief, followed by San Luis.

10. Motions. Student may file a motion regarding whether San Luis's response is legally compliant.. San Luis may file a motion to vacate December 21, 2018, as a hearing date. No other pretrial motions are pending or contemplated. Any motion other than those discussed above 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 three business days prior to PHC of December 7, 2018.

11. 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.

12. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

13. 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 during the hearing unless permission to the contrary is obtained from the ALJ.

14. Special Needs and Accommodations. Neither party anticipates the need for a foreign language interpreter or any other accommodation.

A party or participant in 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.

15. Hearing Closed To the Public. The hearing will be closed to the public.

16. 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 NOON ON DECEMBER 18, 2018, 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. IF THE SETTMENT AGREEMENT IS NOT SUBJECT TO BOARD APPROVAL THE PARTIES SHOULD SIMULTANEOUSLY EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT AND A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb. IF THE AGREEMENT IS SUBJECT TO BOARD APPROVAL, THE SIGNATURE PAGE OF THE SIGNED AGREEMENT SHALL BE EMAILED TO OAH AND THE ACCOMPANYING LETTER SHALL STATE THE DATE WHEN THE BOARD WILL CONSIDER THE SETTLEMENT AGREEMENT.

Dates for hearing will not be cancelled until the letter of withdrawal or notice of agreement subject to board approval and 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 prior to the hearing.

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

IT IS SO ORDERED.

DATE: December 11, 2018

DocuSigned by:

Rebecca Freie

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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings