BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. REDLANDS UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2013030602
REDLANDS UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2013020305 ORDER FOLLOWING PRE-HEARING CONFERENCE

On June 6, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Marian H. Tully, Office of Administrative Hearings (OAH). Parent's advocate, Peter Atwood, represented Student. Attorney Vivian E. Billups appeared on behalf of Redlands Unified School District (District). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on June 17, 18, 19 and 20, 2013, at the District's offices located at 33 West Lugonia, Redlands, California, 92373. The hearing shall begin at 10:30 a.m. on the first day of the hearing and at 9:30 a.m. all other days, unless otherwise ordered.

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 discussed during the PHC are listed below.

(1) Did the District fail to timely schedule an individualized education program team meeting (IEP) to review independent educational evaluations (IEE) after Parents provided the IEE's to the District and,

if so, did such procedural violation deny Student a free appropriate public education (FAPE)?

(2) Does the offer of placement and related services, made by the District team members at the IEP of November and December, 2012, provide Student with a FAPE in the least restrictive environment (LRE)?

(3) Did the District fail to ensure the attendance of persons legally required or otherwise necessary at the November and December 2012 IEP team meetings and, if so, did such procedural failure deny Student a FAPE in the LRE?

(4) Did the District fail to timely provide Parents with all of Student's educational records, when requested by Parents or Student's representative and, if so, did such procedural violation deny Student a FAPE in the LRE?

(5) Did District deny Student a FAPE for the 2012-2013 school year by failing to hold an IEP team meeting and offer Student an appropriate educational placement as recommended by Student's doctor in a note dated on October 19, 2012?[1]

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 exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. District represents that it has served its evidence in compliance with Education Code section 56505, subdivision (e)(7). Student shall serve Student's evidence binder on District by or before 5:00 p.m. June 12, 2012. 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 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.

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[1] The issues set forth in Paragraphs (1) through (4) were agreed to during a PHC in District's case and set forth in an Order dated March 18, 2013. On June 10, 2013, after the PHC in the consolidated matters concluded, Student filed a "Motion to Dismiss District Case # 2013020305" and "Withdrawal of Student Case #2013030602." With the withdrawal of Student's case, paragraph (5) is no longer at issue. Student's Motion to Dismiss District's Case is the subject of a separate Order.

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 shall exchange, and provide the ALJ a copy, of resumes or curriculum vitae 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 not later than 24 hours before the witness is scheduled to testify.

District has identified 28 witnesses to be called at the hearing and Student has identified 51 witnesses by name and one or more "Does" described as bus drivers. Some of the witnesses are listed by both parties. In light of the parties' stipulation to the four days set for hearing, the number of witnesses would make it difficult to complete the hearing as scheduled. 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. Therefore, by 5:00 p.m. on June 12, 1013, each party shall serve on the other party and file with OAH a tentative witness list, including a time estimate of the length of each witness's direct examination testimony, and indicating the witnesses the party actually intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence.

The parties are ordered to meet and confer on or before June 14, 2013, for purposes of preparing a schedule of witnesses to be provided to the ALJ on the first day of hearing. 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. Scope of Witness Examination. 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. If a witness is to be called by more than one party, the party first conducting cross-examination of that witness shall include in that examination all questions intended for the witness on direct examination, in order that each witness need appear and testify 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.

District requested telephonic testimony from Shannon Nielson because Ms. Nielson was out of town during the hearing. Student did not object. The request is granted. District shall provide the witness with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing, shall ensure that the witness testifies from a private location, and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Timely Disclosure of Witnesses/Exhibits. Student's request to delay disclosure of exhibits to no later than 5:00 p.m. June 12, 2012, is granted.

8. Order of Presentation of Evidence. This consolidated matter involves two parties. As the first filing party, District shall proceed first on those issues for which District has the burden of proof, followed by Student on those issues where Student has the burden of proof.

9. Motions.

Motion to Amend

Student filed a Request for Leave to Amend on May 31, 2013, on the grounds Student's current advocate was not aware of a pleading filed on March 19, 2013, in this case which mentioned an IEP team meeting on May 7, 2012. Student seeks to amend to allege the May 7, 2012 team meeting was held over Parent's protest and without Parent's participation and resulted in an IEP that was implemented without Parent's consent. The time period at issue in the proposed amendment is the period between September 5, and November 28, 2012. Student's proposed resolution is placement in an NPS that specializes in autism. For the reasons set forth below, Student's motion to amend the complaint is denied.

The first filing in these consolidated matters was on February 8, 2013, when District filed a Due Process Hearing Request naming Parents on behalf of Student as respondents, OAH Case Number 2013020305 (District's case). District's complaint was amended on February 18, 2013, and again on February 25, 2013.

On March 15, 2013, Student filed a complaint naming District, OAH Case Number 2013030602 (Student's Case), alleging that District denied Student a FAPE from October 19, 2012, when Parents provided a doctor's letter seeking a different program for Student, through the date of filing. Among the remedies sought in Student's case is an appropriate placement.

On March 25, 2013, on Student's motion, OAH consolidated District's case with Student's case.

On May 31, 2013, Student filed a request for leave to file an amended complaint. On June 5, 2013, District filed an opposition to Student's request. Student filed a reply to District's opposition on June 6, 2013.

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C. §1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).)

Student does not demonstrate good cause for amending Student's complaint on the eve of a hearing set on mutually agreed dates four months after District's case was first filed, almost three months after Student's case was filed and more than two months after Student moved to consolidate the two matters. Student's original complaint alleges, in part, that at the IEP team meeting of November 28, 2012, the team became aware that the District was implementing the May 7, 2012 IEP, and "realized that the school and District staff were implementing IEP without parent's consent, IEP that was not signed by Student's parents." Therefore, by referencing the May 7, 2012 IEP, the proposed amended complaint does not allege new facts, but seeks only to extend the period of dispute to begin on September 5, 2012, rather than October 19, 2012, and to limit the requested remedy to an identified NPS placement. Whether the advocate belatedly noticed matters contained in the pleadings filed in the consolidated matters does not amount to newly discovered evidence.

Denying Student's motion to amend does not result in undue prejudice to Student. Education Code section 56509 provides that "this chapter, in accordance with subsection (o) of Section 1415 of Title 20 of the United States Code, does not preclude a parent from filing a separate due process hearing request on an issue separate from a due process hearing request already filed." Moreover, the dates alleged in the proposed amended complaint are within the applicable two year statute of limitations. Because the filing of an amended complaint restarts the applicable timelines, District's case would be unreasonably delayed by amendment at this time. Permitting Student to amend at this time would result in vacating agreed hearing dates and creating further delay in the pending matter where Student is within the two year statute of limitations for a claim arising in May of 2012.

Motion to Continue the Due Process Hearing

On June 10, 2013, Student filed a request to continue the due process hearing on the grounds two District witnesses and Student's neuropsychologist were not available on the agreed upon hearing dates. District opposed 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 for good cause. (34 C.F.R. §300.515(a); Ed. Code, §§ 56502, subd. (f), 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).)

Good cause for a continuance may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

District's case was filed on February 8, 2012, was consolidated on Student's motion, and was continued on April 30, 2013, to the agreed dates. Student cites no law, and none is found, which authorizes IDEA hearings to be delayed due to summer break. Student was or should have been aware of the potential that District witnesses might take vacations, or be otherwise unavailable during the summer break, before agreeing to hearing dates. More importantly, Student has failed to demonstrate that either of the District witnesses are essential or that the evidence sought from the District witnesses could not be obtained from any other witnesses or exhibits. As for Student's witness, Student has failed to show any effort between April 29, 2013, the date Student requested the dates set, and June 9, 2013, the date Student's witness emailed Student of her unavailability, to arrange for her testimony. Student's motion to continue the due process hearing on the grounds of witness availability is denied. The case will proceed on the agreed dates as scheduled. At hearing, Student may readdress with the hearing ALJ issues of obtaining testimony, including telephonic testimony if necessary, by being prepared with exact dates and times of the availability of Student's witness, and/or specific argument about why the information sought from District witnesses who may not be available cannot be obtained from other sources. The hearing ALJ will consider whether any steps, such as adding additional hearing days, are necessary.

Motion to Quash Subpoenas

On May 29, 2013, Student filed a Motion to Quash Subpoenas Duces Tecum (SDTs) for broad categories of medical and other records from Rommie Fakhoury, M.D. and Nancy Fernando, D.O. Student did not provide copies of the SDTs to support his motion.

However, District attached copies of the SDTs to District's opposition. The SDTs call for production by June 10, 2013.

A party to a due process hearing under the Individuals with Disabilities Education Act (IDEA) has the right to present evidence and compel the attendance of witnesses at the hearing. (20 U.S.C. § 1415(h)(2); Ed. Code, § 56505, subds. (e)(2), (3).) The hearing officer in a special education due process proceeding may issue subpoenas or SDT's upon a showing of reasonable necessity by a party. (Cal. Code Regs., tit. 5, § 3082, subd. (c)(2).)

A party to a due process hearing does not have the power to use a subpoena to compel the production of documents before hearing. The applicable statutes and regulation securing the rights to present evidence and compel the attendance of witnesses all relate to the hearing itself. Federal law provides for the rights to present evidence and compel the attendance of witnesses in "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of Title 20 of the United States Code. (20 U.S.C. § 1415(h).) Both of those subsections relate only to due process hearings, not to any prehearing procedures. Similarly, California law extends the rights to present evidence and compel the attendance of witnesses only to "[a] party to a hearing held pursuant to this section ..." (Ed.Code, § 56505, subd. (e).) That section of the Education Code only addresses the rights of parties during a due process hearing. Section 56505, subdivision (a) provides that "[t]he state hearing shall be conducted in accordance with regulations adopted by the board," and under that authority the Board of Education promulgated section 3082, subdivision (c)(2), of Title 5 of the California Code of Regulations, which authorizes the issuance of subpoenas and SDTs. California Code of Regulations, title 5, section 3082, subdivision (c)(2), provides, in relevant part that parties to a special education due process proceeding have the right to compel the attendance of witnesses and that "the hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party."

Special education law does not specifically address motions to quash subpoenas. In ruling on such motions, OAH relies by analogy on the relevant portions of the California Code of Civil Procedure. Section 1987.1 of that code provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders. Here, District has not made a showing of "reasonable necessity" to require District to have prehearing discovery in light of the requirement that parties exchange evidence 5 days prior to hearing. District's request is premature. Student's motion to quash District's SDTs for production of documents on June 10, 2013, is granted.

Request for Order to Enforce Stay-Put

Student filed a Request for Order Enforcing Stay-Put on June 4, 2013. The request consists of a brief argument asserting that stay put is established by an IEP dated September 7, 2011. Student's motion is not supported by a sworn declaration as to his last implemented IEP, his agreed upon educational placement or his current educational placement.

Under federal and state special education law, a special education student is entitled to remain in his or her current educational placement pending the completion of due process hearing procedures unless the parties agree otherwise. (20 U.S.C. § 1415(j); 34 C.F.R. 300.518 (2006); Ed. Code, §§ 48915.5, 56505, subd. (d).) The purpose of stay put is to maintain the status quo of the student's educational program pending resolution of the due process hearing. (*Stacey G. v. Pasadena Independent School District* (5th Cir. 1983) 695 F.2d 949, 953; *Zvi D. v. Gordon Ambach* (2d Cir. 1982) 694 F.2d 904.) For purposes of stay put, the current educational placement is typically the placement called for in the student's IEP which has been implemented prior to the dispute arising. (*Johnson v Special Education Hearing Office* (9th Cir. 2002) 287 F.3d. 1176, 1180; *Thomas v. Cincinnati Board of Education* (6th Cir. 1990) 918 F.2d 618, 625.) Student has not submitted evidence of the September 7, 2011 IEP or that the IEP was implemented before this dispute arose. Argument and allegations are not sufficient to establish these material facts. Therefore, there is no basis upon which to determine stay put placement. The motion is denied.

Other Pretrial Motions

No other pretrial motions are pending or contemplated. 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 June 10, 2013.

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. 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.

13. Special Needs and Accommodations. At present, neither party anticipates the need for special accommodation for any witness or party, or for translation services.

14. Hearing Open/Closed To the Public. At the written request of the Parent, the hearing will be open to the public. District shall provide a hearing room of a size suitable to reasonable public access, such as a boardroom. Should such a room not be available, the

ALJ has discretion to move the hearing to an OAH hearing room in Los Angeles or Van Nuys, California. Student is to advise the ALJ should Student expect any group or members of the press to be present during the hearing. No one may record any part of the hearing, no photography is permitted, and all electronic devices must be off or silent in the hearing room unless permission to the contrary is obtained from the ALJ.

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 matter settles 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. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

Dated: June 11, 2013

/s/

MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings