BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. SOLEDAD UNIFIED SCHOOL DISTRICT,	OAH Case No. 2016070938
SOLEDAD UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2916979115 ORDER FOLLOWING ORDER TO SHOW CAUSE HEARING AND PREHEARING CONFERENCE

On November 28, 2016, a telephonic order to show cause hearing was held before Administrative Law Judge Rebecca Freie concerning Mother's failure to appear for the prehearing conference on November 18, 2016.[1] ALJ Rita Defillippis observed the order to show case hearing as well as the PHC that followed. Mother appeared, assisted by interpreter Santos Aloi. Anthony Miranda, Special Education Director for Soledad Unified School District, appeared as Soledad's representative. Both hearings were recorded.

Mother explained that she failed to appear for the PHC on November 18, 2016, because her daughter was ill and she had to take her to the doctor. Good cause was found for Mother's absence on November 18, 2016, and the matter proceeded to the PHC.

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

1. Hearing Dates, Times, and Location. At the time of the PHC, the hearing was set for one day, Thursday December 1, 2016. It appears that a hearing for these consolidated matters will take three days.

[1] The PHC proceeded on November 18, 2016 as to Soledad's case only. Mother was sent a copy of the order following PHC.

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) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause 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).)

In order to allow the hearing to begin and conclude during the same week, the hearing scheduled for December 1, 2016 will be continued, and the matters will begin on December 6, 2016, and continue on December 7 and 8, 2016. If the hearing is not finished on December 8, 2016, it will continue day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered. The hearing shall take place at Soledad's offices located at 1261 Metz Road, Soledad, California 93960.

2, In the scheduling order, Soledad was ordered 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. On November 28, 2016, Soledad filed a certificate of compliance certifying that the facility for hearing complies with the law. If this changes, Soledad shall inform OAH immediately.

Prior to the beginning of the hearing, Soledad shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and her representatives; (2) a table for Soledad's representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Soledad 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 following the hearing each night, and during the lunch hour if no one is remaining in the room. Soledad 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.

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

Student's Issue

Did Soledad's individualized education plan offer for Student made at the end of the 2015-2016 school year, deny her a free appropriate public education for the 2016-2017 school year because it did not provide for her to continue having a one-to-one aide?

Soledad's Issue

Will Soledad's IEP offer of September 26, 2016, provide Student with a FAPE so that Soledad can implement it without Parental consent?

Proposed Resolutions

Student's Issue

Soledad will continue to provide Student with one-to-one aide support.

Soledad's Issue

Soledad may implement its IEP offer of September 26, 2016, without Parental consent.

3. Exhibits. Student did not file a PHC statement. During this telephonic PHC the information that would have been contained in the prehearing statement was elicited from Mother on the record. At the PHC she stated that she would be presenting a doctor's letter as documentary evidence. She was advised that she needed to provide a copy of this letter to Mr. Miranda no later than 5:00 p.m. on November 29, 2016, as well as any other documentary evidence she intended to present, in compliance with Education Code section 56505, subdivision (e)(7). Soledad has already sent a binder with its exhibits to Student. The order following the PHC with Soledad on November 18, 2016, specified how the exhibit binder should be designed, and it is expected that Soledad's binders will comply with those terms, as will Student's binders if she intends to introduce additional exhibits for admission, and any additional exhibits exchanged by the parties must be exchanged in accordance with Education Code section 56505, Subdivision (e) (7), unless the parties mutually decide on a later date for the exchange.

Soledad stated in its PHC statement that it's binder would contain the IEP from September 26, 2016, Student's first quarter grades for this school year, and an excerpt from the Monterey County Special Education Local Plan Area Handbook from August 2014 concerning the provision of instructional aides, as well as a copy of Education Code section 56345, subdivisions (d)(1-4). The ALJ advised the parties that in order to render her Decision, the evidence should include the IEP offer made at the end of the 2015-2016 school year, and the last signed and implemented IEP for Student. Mr. Aguilar confirmed that Mother had been provided with translated IEP documents in the past, and she was advised that it would be helpful for her to bring these translated documents to the hearing.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit that was not timely exchanged shall not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. Student plans to call Mr. Ceja, Student's sixth grade teacher, and Ms. Gonzalez (who was not further identified) as witnesses. They are current Soledad employees, and Mr. Miranda agreed to make them available for hearing. Student indicated that she did not intend to call other witnesses, But should she decide to, Mother should notify Soledad in accordance with legal timelines. The parties are ordered to meet and confer about the witness schedule no later than 5:00 p.m. December 1, 2016. Soledad shall have witnesses available to testify on the first day of hearing if agreement on the order of witnesses is not achieved.

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 at the discretion of the ALJ.

Evidence, both testimonial and documentary will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

Prior to the commencement of the due process hearing, the ALJ and 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.

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. 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 intends to call a witness who will need to testify telephonically.

7. Electronic Recording of Hearing.

a. Audio Recording. The parties are unsure if they will make an audio recording of the hearing. Should they decide to do so, they shall request leave of the ALJ to do so. Any recording of the hearing is subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. 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].) Each party will bear the burden of proof on its issue. In this case, Soledad will present its case first, and then Student.[2]

9. Motions. No pretrial motions are pending or contemplated. Any party filing a motion after November 28, 2016, shall state in the motion why the motion was not made prior to or during the prehearing conference of November 28, 2016.

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.

[2] The parties were informed at the PHC that Student's case would be presented first, but it is now determined that Soledad should present its case first.

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 unless permission to the contrary is obtained from the ALJ.

13. Special Needs and Accommodations. A Spanish language interpreter is required for Mother. OAH will provide an interpreter for the hearing. No other accommodations are anticipated for the parties and witnesses.

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

14. Hearing Open/Closed To the Public. At the request of Student, the hearing will be open to the public.

15. In preparation for the hearings, the parties are encouraged to access the OAH website for resources including the Special Education Handbook. The English version can be accessed at:

http://www.documents.dgs.ca.gov/oah/SE/SE%20Handbook.pdf

The Spanish language edition can be accessed at:

http://www.documents.dgs.ca.gov/oah/SE/SE%20Guide%20to%20understanding%20DPHSpanish.pdf

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 OF 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.

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

IT IS SO ORDERED.

DATE: November 29, 2016

DocuSigned by:

Rebecca Frei

D1AE0D9E81A848C...

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings