BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. MANTECA UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015120472
MANTECA UNIFIED SCHOOL DISTRICT, v. PARENTS ON BEHALF OF STUDENT.	OAH Case No. 2016030014 ORDER FOLLOWING PREHEARING CONFERENCE AND SETTING DUE PROCESS HEARING DATES

On March 7, 2016, a telephonic prehearing conference was held before Administrative Law Judge Kara Hatfield, Office of Administrative Hearings. Robert Closson, Advocate, and Mother appeared on behalf of Student. Aimee Perry and Summer Dalessandro, Attorneys at Law, appeared on behalf of Manteca Unified School District. The PHC was recorded.

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

1. The hearing shall take place on March 15, 16, 17, 18, 21, 22, 23, and 24, 2016,[1] and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m.., with the exception of the first day of hearing, and March 21, 2016, which shall begin at 9:30 a.m., unless otherwise ordered. The hearing shall take place at Manteca's office at 2271 West Louise Avenue, Manteca, CA 95337. Manteca shall ensure the availability of parking for Student's advocate and parents, and the ALJ.

As ordered in the scheduling order, Manteca is 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

[1] On the first day of hearing, the parties may review and discuss with the ALJ the dates set for the due process hearing.

disabilities. Manteca's attorney was not certain whether Manteca had already certified that it would provide a facility for this case that complied with the law. Manteca shall inform OAH within two days of the date of the PHC it is able to certify that it will provide a facility that complies with the law.

Prior to the beginning of the hearing, Manteca 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 Manteca's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Manteca 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.

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. Dismissal of Claims Outside OAH Jurisdiction. Student's complaint does not specifically identify claims under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.) (Section 504), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), State civil rights laws, or other laws or theories of liability. However, Student's complaint uses language to make specific allegations including the terms "negligence" and "deliberate indifference," which suggest Student might be seeking to pursue claims on theories of liability beyond the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.). In its PHC Statement, and during the PHC, Manteca moved to dismiss any claims beyond those under the IDEA on the grounds that OAH has no jurisdiction to hear them.

OAH does not have jurisdiction to entertain claims based on Section 504, the Americans with Disabilities Act, or other related state and federal civil rights laws, or claims based on tort theories of negligence. The purpose of the IDEA is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited

to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Manteca's motion is granted. Accordingly, the claims alleged in what Student identified as Issue N, and any other claims which have as their basis any theory of liability that is not the IDEA, are dismissed. The matter shall proceed to hearing on the remaining issues, stated below.

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

Student's Issues:[2]

1. From December 10, 2013,[3] did Manteca commit the following procedural violations which resulted in the denial of a free appropriate public education to Student by denying Parent meaningful participation in the individualized education program development process or causing a deprivation of educational benefit:

   a) failing to assess Student during the 2014-2015 school year in all areas of suspected disability, including but not limited to, specifically, behavior and dyslexia;

   b) failing to provide prior written notice regarding Manteca's decision not to assess Student for dyslexia;

   c) failing to assess Student using proper and appropriate tests, assessments, and evaluations given Student's identified race;

   d) significantly impeding Parent's meaningful participation in the development of Student's March 19, 2014,[4] May 16, 2014, March 16 2015, and November 20, 2015[5] Individualized Education

[2] The parties shall be prepared to review and discuss with the ALJ the issues identified in this Order Following PHC on the first day of hearing. However, any objections to the issues as framed in this order shall be filed no later than March 14, 2016.

[3] During the PHC, Student agreed to December 10, 2013 as the applicable date for the claim limit in his case.

[4] During the PHC, Student agreed the correct date for the IEP team meeting was March 19, 2014.

[5] During the PHC, Student agreed the correct date for the IEP team meeting was November 20, 2015.

Programs by refusing to provide Parent accurate and pertinent information needed to make decisions, depriving Parent of the ability and right to give informed consent;

e) predetermining Manteca's offers in Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's;

f) predetermining not to offer Student services for the 2014 and 2015 extended school years;

g) failing to identify Student's present levels of performance in Student's March 19, 2014, May 16, 2014, and November 20, 2015 IEP's;

h) failing to develop appropriate goals and objectives in Student's May 16, 2014, and March 16, 2015 IEP's;

i) failing to develop goals and objectives in each area of unique need in Student's May 16, 2014, and March 16, 2015 IEP's;

j) altering Student's assessments and records to hide the fact that Student was not making the educational progress reported in Student's IEP's and educational records;

k) refusing to discuss and disclose what scientifically based methods of instruction would be used in Student's May 16, 2014, and March 16, 2015 IEP's;

l) failing to provide prior written notice regarding Manteca's refusal to state in Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's what scientifically based, peer-reviewed, research-based behavior intervention program and methodology Manteca would use;

m) failing to provide progress monitoring of Student's May 16, 2014 and March 16, 2015 IEP's appropriate to meet Student's unique needs;

n) failing to have an assistive technology team member present at the May 16, 2014 and March 16, 2015 IEP team meetings;

o) failing to discuss during the March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP team meetings the continuum of placement options;

p) failing to identify in Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's how Manteca would

meet Student's needs that result from his disabilities to enable him to be involved in and progress in the general curriculum;

q) failing to identify in Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's the extent to which Student would not participate with nondisabled students in regular education classes or extra-curricular and other non-academic activities;

r) failing to state in in Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's why Student could not be tested by regular state standards or why alternative assessment for state testing was appropriate;

s) failing to state in Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's how the major components of each IEP related to each other;

t) failing to show how Student's March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's had a direct relationship between the present levels of performance identified in each IEP and the specific educational services and supports that would be provided to Student under each IEP, respectively; and

u) failing at the November 21, 2015 IEP team meeting to respond to a written notice from Parent requesting that Student be mainstreamed, that his last signed IEP be fully implemented, and that he be fully and completely tested for all suspected disabilities?

2. From December 13, 2013 forward, did Manteca substantively deny Student a FAPE by:

a) failing to offer Student an appropriate placement in the least restrictive environment in the March 19, 2014, May 16, 2014, March 16, 2015, and November 20, 2015 IEP's;

b) failing to offer Student appropriate accommodations, modifications, supports, and supplementary aids, including assistive technology, in the May 16, 2014 and March 16, 2015 IEP's; and

c) making inadequate offers such that Student experienced regression during the 2014-2015 school year?

3. Did Manteca deny Student a FAPE by failing to timely implement Student's March 19, 2014 and March 16, 2015 IEP's?

Manteca's Issue:

1. May Manteca assess Student pursuant to the assessment plans dated November 20, 2015, and February 5, 2016, without Parents' consent?

Student's proposed remedies include placement at a non-public school, a 1:1 aide, an independent educational evaluation in the area of reading, service from a reading specialist, and assistive technology. Manteca's proposed remedy is an order authorizing Manteca to assess Student as specified in the November 20, 2015 and February 5, 2016 assessment plans.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but shall place the letter "S" or "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6," or "D-1, D-2"). Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be Bates-stamped. Each exhibit binder shall contain a detailed table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties may not serve exhibits on OAH prior to the hearing.

The parties are ordered to meet and confer by March 11, 2016, to delete duplicate exhibits from the exhibit binders.

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.

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, unless allowed at the discretion of the ALJ. .

The parties are ordered to meet and confer by March 11, 2016, as to the schedule of witnesses. The parties shall provide the ALJ with a detailed schedule which shall include an estimate of time for each side's direct and cross examination. Each witness will only be called once to testify, except for rebuttal purposes, and both parties shall examine the witness when the witness is first called. Manteca 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 each 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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, 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. Unless otherwise ordered, the witness shall testify from a private room using a landline telephone. No witness will be heard by telephone unless all these requirements have been fulfilled. Neither party has requested telephonic testimony.

8. Electronic Recording of Hearing.

a. Audio Recording. Student's and Manteca's requests to audio record the hearing are granted. Only the parties' attorneys may audio record the hearing, and 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. Only the ALJ's recording shall be deemed the official transcript of the hearing, unless otherwise ordered. The audio recording may only be used by the attorneys, may not be shared with others, may not be played to any witness, and may not be published or disseminated in any form or by any means. Operation of any 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.

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 with respect to the issues raised in his complaint, and Manteca is the petitioning party with respect to the issue raised in its complaint. In this consolidated matter, Student's case has been designated as the primary case. Accordingly, Student shall present his case-in-chief, followed by Manteca.

10. Motions. A noted above, Manteca's motion to dismiss Student's claims beyond OAH's jurisdiction is granted. No further prehearing motions are pending or contemplated. Any prehearing motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference of March 7, 2016.

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 Spanish language interpreter is required during the testimony of witness J. Cruz. The parties shall inform the ALJ on the first day of hearing of the date, time, and duration of that witness' testimony so that OAH may schedule an interpreter to be present at the necessary time.

A reasonable lunch break shall be taken daily, and the attorneys may coordinate with the ALJ regarding the time and duration of a lunch and other breaks. No other accommodations or interpreting services are known to be needed at this time.

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/Accommodations.aspx

14. Hearing Open to the Public. At the request of Student, the hearing will be open to the public. Any media attending the hearing shall identify themselves to the ALJ before the start of hearing each day

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 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.

DATE: March 10, 2016

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Kara Hatfield
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KARA HATFIELD
Administrative Law Judge
Office of Administrative Hearings