BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: DESERT SANDS UNIFIED SCHOOL DISTRICT, v. STUDENT.	OAH Case No. 2014051076 (Primary)
DESERT SANDS UNIFIED SCHOOL DISTRICT, v. STUDENT.	OAH Case No. 2014031057 ORDER FOLLOWING PREHEARING CONFERENCE OF SEPTEMBER 15, 2014

On September 15, 2014, a telephonic prehearing conference was held before Administrative Law Judge Paul H. Kamoroff, Office of Administrative Hearings. Jack B. Clarke and Dina Harris, Attorneys at Law, appeared on behalf of the Desert Sands Unified School District. Mother appeared on behalf of Student. Student also appeared. 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 September 23, 24 and 25, 2014, and continue day by day thereafter, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the District's offices located at 47-950 Dune Palms Road, La Quinta, CA 92253. 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.

District 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 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 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.

District 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. The issues at the due process hearing are listed below.

a) Whether District's individualized education program offer of December 3, 2013, as modified on April 9, 2014 and April 22, 2014, offered Student a free and appropriate public education?

b) Whether District is entitled to conduct assessments pursuant to a February 2014 assessment plan, without Student consent?

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. 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 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 by September 19, 2014, as to the schedule and testimony of witnesses. The parties shall coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed 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.

The parties shall attempt to reach agreement on a witness list for the first day of 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.

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.

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.

7. 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. Accordingly, District shall present its case-in-chief, followed by Student. If a witness is to be called by more than one party, each party shall ask questions of the witness so that the witness does not need to return for testimony.

8. Motions.

District's motion to exclude witnesses:

On September 10, 2014, Student submitted a prehearing conference statement which included, amongst other witnesses, District school board members and its Superintendent. During the Prehearing Conference, District moved to exclude these witnesses on the basis that they had not attended Student's IEP team meetings or participated in the development of his IEP's.

Only evidence that is relevant is admissible. (Evid. Code, §§ 350 and 351.) Testimony of a witness concerning a particular matter is inadmissible unless the witness has personal knowledge of the matter. (Evid. Code, § 702, subd. (a).) Where the opposing party objects, as is the case here, the party seeking to introduce the testimony must demonstrate that the witness has personal knowledge regarding the subject of the testimony prior to the witness testifying. (Ibid.)

Expert testimony is limited to subjects that are sufficiently beyond common experience that the opinion of an expert would assist the trier of fact and is based on matter including special knowledge, skill, experience, training, and education related to the subject of the testimony. (Evid. Code, § 801.) Expert opinion is limited to those subjects that are beyond the competence of persons of common experience, training, and education. (*People v. Cole* (1956) 47 Cal. 2d 99, 103.)

Here, the witnesses which Student seeks to submit do not have personal knowledge regarding the development of his IEP's or assessments, nor are they being called upon to provide expert testimony.

Consequently, District's motion to exclude as witnesses for the consolidated matters members of the District school board and its Superintendent(s) who have not participated in Student's IEP team meeting(s) is granted.

District's motion to dismiss Parent as a party:

During the prehearing conference, District moved to dismiss Parent as a party to the consolidated matters, on the basis that Student had reached the age of majority and has failed to transfer his educational rights to Parent.

Under federal and California special education law, when a student eligible for special education reaches the age of 18 years, the special education rights previously held by the parent transfer to the student. (34 C.F.R. § 300.520(a)(ii)(2006); Ed. Code, § 56041.5.) Specifically, Education Code section 56041.5 provides:

> When an individual with exceptional needs reaches the age of 18, with the exception of an individual who has been determined to be incompetent under state law, the local educational agency shall provide any notice of procedural safeguards required by this part to both the individual and the parents of the individual. All other rights accorded to a parent under this part shall transfer to the individual with exceptional needs. The local educational agency shall notify the individual and the parent of the transfer of rights.

Here, Student turned 18 years-old on July 11, 2014, and he holds all educational rights. For these reasons, District's motion to dismiss Parent is granted.

Student's motion to permit his mother to represent him as an educational advocate:

During the Prehearing Conference, Student requested that his mother be permitted to represent him as an educational advocate for the consolidated matters.

The Individuals with Disabilities Education Act permits nonlawyers to file complaints on behalf of Students and school districts, and to represent their clients in mediations, settlement negotiations, and due process hearings. (20 U.S.C. § 1415, subd. (h).) In California, there are no regulations or statutes that mandate legal requirements for these representatives. Accordingly, Student's request is granted.

No additional 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 September 15, 2014.

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

10. 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.

11. Special Needs and Accommodations. District shall provide Student a rolling chair and bookstand during the hearing. Mother shall be permitted to assist Student in reading documents during the hearing, including while testifying. Student's request for a reading and writing assistant provided by OAH has been taken under submission.

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

13. 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.

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

IT IS SO ORDERED.

DATE: September 15, 2014

/S/

PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings