

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2012080506

ORDER FOLLOWING PRE-HEARING  
CONFERENCE

On November 19, 2012, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Alexa J. Hohensee, Office of Administrative Hearings (OAH). Michael J. Smith, Attorney at Law, appeared on behalf of Student. Lauri A. LaFoe, Attorney at Law, appeared on behalf of the Los Angeles 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 November 27-29, 2012, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:30 a.m. and end at 5:00 p.m., unless otherwise ordered.

The hearing shall take place at the offices of the Office of Administrative Hearings located at 15350 Sherman Way, Suite 300, Van Nuys, California 91406.

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 are listed below.

(1) Whether District denied Student a free appropriate public education (FAPE) from October 2007 through October 2010 by depriving Parent of the opportunity to meaningfully participate in the IEP process by failing to provide Parent with time records or service logs documenting the resource services provided to Student during that time.

(2) Whether District denied Student a free appropriate public education (FAPE) from March 11, 2008 to March 23, 2009 by:

- (a) Failing to provide Student with prior written notice of its refusal to provide adult assistance as requested by Student's parent (Parent) at the IEP team meeting;
- (b) Failing to implement the March 11, 2008 IEP, including resource services;
- (c) Failing to offer appropriate instructional accommodations; or
- (d) Failing to offer Student a one-on-one instructional assistant throughout the school day.

(3) Whether District denied Student a FAPE from March 23, 2009 to April 28, 2010 by:

- (a) Failing to conduct triennial assessments in all areas of suspected disability;
- (b) Depriving Parent of the opportunity to meaningfully participate in developing the March 23, 2009 IEP by failing to provide Parent with a copy of the IEP or notice of procedural rights until April 28, 2010, and by providing an incomplete copy of the March 23, 2009 IEP on April 28, 2010;
- (c) Predetermining the offer of placement and services;
- (d) Including two offers of placement in the March 23, 2009 IEP;
- (e) Failing to adequately implement the resource services provided for in the March 23, 2009 IEP;
- (f) Failing to offer appropriate instructional accommodations; or
- (g) Failing to offer Student a one-on-one instructional assistant throughout the school day.

(4) Whether District denied Student a FAPE from April 28, 2010 to February 14, 2011 by:

- (a) Failing to assess Student in all areas of suspected disability

- (b) Depriving Parent of the opportunity to meaningfully participate in developing the April 28, 2010 IEP because she was not provided with a complete copy of the April 28, 2010 IEP until February 14, 2011,
- (c) Making no written offer of placement prior to October 2010;
- (d) Predetermining the offer of placement and services to Student;
- (e) Failing to offer appropriate instructional accommodations;
- (f) Failing to provide Student with a one-on-one instructional assistant throughout the school day;
- (g) Failing to adequately implement the resource services provided for in the April 28, 2010 IEP; or
- (h) Failing, from the beginning of the 2010-2011 school year, to convene an IEP team meeting to discuss Student's failure to make anticipated progress.

(5) Whether District denied Student a FAPE from February 14, 2011 to March 1, 2012 by:

- (a) Failing to assess Student in all areas of suspected disability;
- (b) Failing to offer appropriate instructional accommodations;
- (c) Failing to address Student's unique needs arising from his attention deficit hyperactivity disorder (ADHD);
- (d) Failing to offer Student a one-on-one instructional assistant throughout the school day;
- (e) Failing to adequately implement the resource services provided for in the February 14, 2011 IEP;
- (f) Failing to properly implement the accommodations provided for in the February 14, 2011 IEP; or
- (g) Failing, from the beginning of the 2011-2012 school year, to convene an IEP team meeting to discuss Student's failure to make anticipated progress.

(6) Whether District has denied Student a FAPE from March 1, 2012 through the 2012-2013 school year by:

- (a) Failing to assess Student in all areas of suspected disability;
- (b) Failing to provide Parent with prior written notice of its refusal to provide adult assistance, or assistive technology and central auditory processing assessments, as requested by Parent at the IEP team meeting of March 1, 2012;
- (c) Failing to offer appropriate instructional accommodations;
- (d) Failing to address Student's unique needs arising from his attention deficit hyperactivity disorder (ADHD);
- (e) Failing to offer Student a one-on-one instructional assistant throughout the school day;
- (f) Failing to adequately implement the resource services provided for in the March 1, 2012 IEP; or
- (g) Failing to properly implement the accommodations provided for in the March 1, 2012 IEP.

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 represent that they have served 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 5:00 p.m. on November 20, 2012, as to the schedule of witnesses, to 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 witness schedule will be finalized at the commencement of the due process hearing. The ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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.

Student anticipates calling District employee Larry Solomon to testify to facts concerning the statute of limitations on the first day of the hearing, which will be bifurcated as set forth at Section 9 of this order. District shall have Mr. Solomon available to testify as the first witness. District shall also arrange to have Mr. Solomon available the morning of the second day of hearing if Mr. Solomon's testimony is not completed on the first day. 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. Timely Disclosure of Witnesses. District stated at the PHC that it would need to call witnesses not included in its PHC statement if District does not prevail on its motion to dismiss all or part of Student's claims as barred by the statute of limitations. District is ordered to file with OAH, and serve on Student, its amended list of witnesses no

later than 12:00 p.m. noon on November 20, 2012. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits “at least” five business days prior to the hearing, and service as ordered will disclose District’s witnesses to Student with sufficient time for District to present its defense on the third day of hearing.<sup>1</sup>

8. Order of Presentation of Evidence. In an administrative due process hearing, 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 and therefore shall have the burden of proof as to his issues, along with whether an exception to the statute of limitations exists.

Except as to the limited issue in the bifurcated first part of the hearing (as set forth below in Section 9), where Student and District intend to call the same witness to testify, each party will examine the witness immediately after the other party, that is, combine both their cross-examination and direct questions, so that the witness will need to be called to the witness stand only once, unless needed to be re-called as a rebuttal witness.

9. Bifurcation of Hearing. District moved at the PHC to dismiss those portions of Student’s Issues 1 – 9 and 11 (restated in this PHC order as Issues 1 – 4) arising prior to August 17, 2010, as barred by the statute of limitations. The statute of limitations for due process complaints in California is two years prior to the date of filing the request for due process. (Ed. Code § 56505, subd. (1); see also 20 U.S.C. § 1415(f)(3)(C).) However, title 20 United States Code section 1415(f)(3)(D) and Education Code section 56505, subdivision (1), establish exceptions to the statute of limitations, including where the parent was prevented from filing a request for due process due to specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint, or the local educational agency’s withholding of information from the parent that was required to be provided to the parent. The two narrow exceptions to the IDEA statute of limitations require factual determinations that can only be made after giving the parties an opportunity to develop the record.

The federal and state law pertaining to special education due process administrative proceedings does not contain a specific reference to the procedure of bifurcating issues for trial. Such authority resides in the discretion of the administrative law judge, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

Issues 1 through 4 for hearing require a determination of whether Student was deprived of a FAPE for various reasons, from October 2007 through August 17, 2010. These issues seek a decision on District’s offer and implementation of IEP’s dated March 11, 2008, March 11, 2009 and April 28, 2010, and earlier, each of which was developed more than two years prior to the filing of Student’s complaint. Therefore, a separate hearing to determine

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<sup>1</sup> Student has given a two day estimate to present its case in chief, and District’s defense is anticipated to begin on the third day of hearing.

whether an exception to the statute of limitations exists would promote judicial efficiency, as a decision may significantly limit the issues, witnesses and evidence for hearing. Accordingly, the hearing on Student's complaint will be bifurcated, with the issue of whether an exception to the statute of limitations exists to be heard first, on the first day of hearing. It is anticipated that the ALJ will issue an oral ruling on District's motion to dismiss on the first day of hearing, and that the hearing will promptly proceed as to the merits of Student's complaint thereafter.

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 interpretation services.

14. 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.

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

IT IS SO ORDERED.

Dated: November 20, 2012

/s/

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ALEXA J. HOHENSEE  
Administrative Law Judge  
Office of Administrative Hearings