

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

TORRANCE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014010444

ORDER FOLLOWING PRE-HEARING
CONFERENCE

On May 12, 2014 a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Eileen Cohn, Office of Administrative Hearings (OAH). Andrea Tytell, Attorney at Law, appeared on behalf of Student. Sharon Watt, Attorney at Law, appeared on behalf of District. The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following order which is effective the date of the prehearing conference, May 12, 2014:

1. Hearing Dates, Times, and Location. The hearing shall take place Tuesday, May 27, 2014, 9:30 a.m. and on May 28 and 29, 2014, 9:00 a.m., continuing day to day, Monday through Thursday, and as needed at the discretion of the ALJ.

The hearing shall take place at the District's offices located at 2336 Plaza del Amo, Torrance 90501. District shall ensure that the facilities can accommodate a courtroom-like setting.

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 and were developed from Student's Amended Due Process Complaint. The issues were organized in chronological order based upon the pleadings. Student's Issues, identified as Issues 10 and 11 in the Amended Complaint, were arguments in support of Student's eligibility claims and, as such, were not included as separate claims.

a) Whether District failed in its child find obligations to identify Student as a pupil eligible for special education and related services after Student returned from District's winter break in January 2013.

b) Whether District denied Student a free appropriate public education by not making the correct eligibility determination when it designated Student as eligible for special education under the category of emotional disturbance instead of other health impaired.

c) Whether District denied Student a free and appropriate public education in its June 3, 2013, individual education program offer by failing to:

- 1) consider the unique needs of Student based upon incidents of pupil bullying, shame and stigmatization;
- 2) consider her unique needs in planning adequate safety measures in the event of an emergency;
- 3) develop goals which addressed Student's selective mutism;
- 4) develop a behavior support plan which addressed school avoidance, anxiety, executive functioning, emotional regulation and stress management; and
- 5) offer social, emotional and behavior services through the Autism Spectrum Services and Inclusion Support Torrance Team (also known as ASSISTT).

d) Whether District denied Student a free and appropriate public education in its September 24, 2013, individual education program offer by failing to:

- 1) consider the unique needs of Student based upon incidents of pupil bullying, shame and stigmatization; and
- 2) consider her unique needs in planning adequate safety measures in the event of an emergency;
- 3) develop a behavior support plan which addressed school avoidance, anxiety, executive functioning, emotional regulation and stress management.
- 4) offer social, emotional and behavior services through the Autism Spectrum Services and Inclusion Support Torrance Team (also known as ASSISTT).

e) Whether District denied Student a free and appropriate public education on October 9, 2013, when it denied the request of Student's parents to:

- 1) change her eligibility designation from emotional disturbance to other health impaired
- 2) host a disability awareness seminar about selective mutism;
- 3) provide specialized services for Student from a highly regarded expert on selective mutism employed by the special education local plan area;
- 4) provide Student independent speech and language services from a therapist with expertise in selective mutism.

f) Whether District denied Student a free and appropriate public education in its December 6, 2013, individual education program offer by failing to:

- 1) consider the unique needs of Student based upon incidents of pupil bullying, shame and stigmatization; and
- 2) consider her unique needs in planning adequate safety measures in the event of an emergency;
- 3) develop a behavior support plan which addressed school avoidance, anxiety, executive functioning, emotional regulation and stress management.
- 4) offer services from the Autism Spectrum Services and Inclusion Support Torrance Team (also known as ASSISTT).

g) Whether District denied Student a free appropriate public education when, on December 12, 2013, it refused to administer a sensory based praxis test at the request of Student's parents.

h) Whether District denied Student a free and appropriate public education when, on December 12, 2013, it refused the request of Student's parents to provide clinic-based occupational therapy services.

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.

The parties are ordered to meet and confer as set forth in Order 4 below, and to agree upon the operative individual education program team meeting documents, so as to avoid the unnecessary expenditure of time at the hearing.

4. Witnesses. The parties are ordered to meet and confer no later than Friday, May 16, 2014, to develop and present to the ALJ the first morning of the hearing, a witness list, which includes the order of witnesses, and the estimated time for direct and cross-examination. The parties shall plan to call a witness only once, except for rebuttal, and complete all direct, cross, re-direct and re-cross during that time. The ALJ shall finalize the witness schedule at the start of the hearing. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. The parties shall also 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.

Each party is responsible for procuring the attendance at hearing of its own witnesses, except each party shall make witnesses under its control reasonably available. District has disclosed one witness who is no longer in its employ or agency, and Student has been advised to contact OAH to obtain a subpoena to secure the attendance of this witness. Other than this one witness, District shall be obligated to produce witnesses without subpoena, and Student shall be obligated to produce its agents without subpoena.

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. Parents shall be available to testify when there are gaps in witness testimony. When the testimony of Parents is completed, District witnesses shall be available to testify to ensure that the hearing shall be completed during the allotted time.

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 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.

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. The parties do not intend to examine any witnesses by telephone. If either party need to call a witness by telephone, they should notify opposing counsel and seek a stipulation, and also notify the ALJ at the hearing. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) 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 consult with the District to 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 and Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing. At the discretion of the ALJ, except for purposes of impeachment or rebuttal, unless there is a showing of good cause, and an opportunity for the opposing party to timely respond to the new evidence without extending the time for hearing, failure to comply with the Education Code shall result in the exclusion of evidence or witnesses.

8. District's Motion to Record the Proceedings is Denied.

On May 9, 2014, District moved to allow it to record the proceedings in order to defend itself from representations made by Student to the public about District's offer of services. District alleges that it received 29 emails within a short period of time in early May from Parent and members of the public accusing it of not providing Student services. Student's parents then asked the District to produce the e-mails to them. Once Student requested that the hearing be open to the public, District considered it necessary to record the proceedings to defend itself from disparaging public attacks.

District's request was heard at the prehearing conference and before any written response was received from Student. Student did not object to District's motion.

District's motion is denied. As further stated below in Order 10, the ALJ has the discretion to make such orders necessary to ensure the efficient and fair administration of justice.

The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. Neither party shall be allowed to record or photograph the proceedings, and public observers shall not be allowed to record or photograph the proceedings, including members of the media. Members of the media shall be required to appear before the ALJ at the start of the hearing and identify themselves. To preserve the integrity of the due process hearing, and the veracity and credibility of witness testimony, the witnesses shall be

admonished not to speak with anyone, including the media, about the hearing. The parties are also admonished not to approach or speak directly with the ALJ unless required to do so during the hearing. The parties shall notify invited observers, employees and agents, not to approach or speak with the ALJ unless required to do so during the hearing. To ensure the integrity of the due process proceeding and the ALJ's safety, the ALJ shall not engage in any off the record discussion with the parties or observers. Violations of this order may subject the parties and the public observers to sanctions, or require the ALJ to close the proceedings as further set forth in Order 10 below.

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 May 12, 2014.

9. Stipulations. At their meet and confer to be held no later than May 16, 2014, the parties are ordered to consider stipulations to pertinent facts, contentions or resolutions. 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 during the hearing unless permission to the contrary is obtained from the ALJ.

Based upon the discussion at the prehearing conference about the publicly charged nature of the dispute, the ALJ notified counsel and the parties that they, and their employees agents, and observers, shall be held accountable and subject to sanctions for any conduct that interferes with the efficient administration of the due process hearing, including conduct that serves to harass or intimidate witnesses. (Gov. Code, §§ 11455.10, 11455.20, 11455.30; Cal. Code Regs., tit. 1, § 1040.) Further, the parties are notified that the ALJ will exercise discretion to restrict observers or public observers if any of them interfere with the orderly conduct of the hearing. (Cal. Code Regs., tit. 1, § 1040 (e).)

11. 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.

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

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

Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off during the hearing unless permission to the contrary is obtained from the ALJ. Each invitee and public observer shall be required to sign in and provide their contact information to the ALJ.

Each invitee and public observer shall be advised not to approach the ALJ, the witnesses or the parties during the hearing, or at any time while the record remains open, so as not to interfere with the veracity and credibility of the testimony.

The parties are ordered to notify their public invitees that they are subject to the rules of decorum set forth herein and as set forth in Order 10. To the extent authorized by law, counsel, parties, and public observers shall be held responsible for any conduct that violates this prehearing conference order and any other orders made by the ALJ at the hearing.

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.

DATE: May 15, 2014

/s/

EILEEN COHN
Administrative Law Judge
Office of Administrative Hearings