

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN JOSE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2014070309

ORDER FOLLOWING PREHEARING
CONFERENCE

On August 11, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Joy Redmon, Office of Administrative Hearings. Leticia N. Whetstone, Attorney at Law, appeared on Student's behalf. Rodney L. Levin, Attorney at Law, appeared on San Jose Unified School District's (San Jose) behalf. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at 855 Lenzen Ave., Suite 218, San Jose, California 95126, in a room to be provided by San Jose.¹ It shall commence on August 21, 2014, from 9:30 AM through 5:00 PM. The hearing will also be conducted on August 26, 27, and 28, 2014, from 9:00 AM until 5:00 PM unless otherwise ordered.

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.

¹ At a minimum, the hearing room shall have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for San Jose's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. San Jose shall ensure that the hearing room and other facilities that will be used during the hearing comply with the accessibility requirements of the Americans with Disabilities Act.

2. Issues and Proposed Resolutions.

ISSUE 1. Did San Jose deny Student a free appropriate public education in the 2012-2013 school year by:

- a. Failing to assess Student, in violation of its child find duties;
- b. Failing to find Student eligible for special education under the categories of specific learning disability and other health impairment;
- c. Failing to offer and provide an individualized education program and designated instructional services including transportation?

ISSUE 2. Did San Jose deny Student a FAPE in the 2013-2014 school year by failing to have an IEP in effect for Student at the beginning of the school year resulting in no special education program and services being provided until October 30, 2013?

Proposed Resolutions:

- a. Find that Student was eligible for special education and related services during the 2012-2013 school year and that San Jose denied her a FAPE by failing to offer and provide special education program and services.
- b. San Jose will provide compensatory education of not less than 300 hours collectively in the area including but not limited to: math, organizational and study skills, and support for areas of processing weakness, and counseling for executive functioning deficits, social skills training and visual therapy.
- c. Reimbursement for transportation costs incurred during the 2012-2013 school year at the IRS mileage rate.
- d. Any and all remedies deemed appropriate by the ALJ.

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 in a way that makes clear the party offering it (such as "S1" or "D2"). 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. Each party shall serve an exhibit binder containing its respective exhibits on the other party by 5:00 p.m. on August 14, 2014, 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.

a) Each party is responsible for procuring its own witnesses for hearing. Each party shall make witnesses under its control reasonably available to the other party. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student and San Jose collectively identified more than 45 witnesses for hearing. Some of the witnesses are listed by both parties. In light of the fact that four days have been scheduled for the hearing, examining all proposed witnesses would make it difficult to complete the hearing as scheduled. Therefore, the parties are ordered to meet and confer to develop a tentative witness list, identifying the witnesses the party intends to call, as opposed to witnesses the party may call depending on the flow of the hearing and the evidence. The proposed witness list shall contain a time estimate each witness's direct examination testimony. Prior to commencing the due process hearing, the ALJ and the parties will discuss the tentative witness list, 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 their testimony.

5. Scope and Order 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

6. Telephonic Testimony. Presently neither party has made a specific request for telephonic testimony; however, each party reserved their right to make the request. A party seeking to present a witness by telephone shall move in advance for leave to do so; 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.

7. Electronic Recording of Hearing.

a. Audio Recording. At present both parties intend audio record the hearing. The requests were granted on the 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. Motions. At present no prehearing motions are pending or contemplated. Any 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 this prehearing conference.

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. At present neither party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter.

12. Hearing Closed To the Public. At the request of Parents, the hearing will be closed to the public.

13. Settlement. The parties are encouraged to continue their attempts 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. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. IF A FULL AND FINAL SETTLEMENT 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, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. 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: August 11, 2014

/s/

JOY REDMON
Administrative Law Judge
Office of Administrative Hearings