

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

MORGAN HILL UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT ,

OAH Case No. 2014120236 (Primary)

PARENTS ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014110523

ORDER FOLLOWING PREHEARING
CONFERENCE AND SCHEDULING
HEARING FOR APRIL 1-3, AND 7-9,
2015

On March 23, 2015, a telephonic prehearing conference was held before Administrative Law Judge Robert G. Martin, Office of Administrative Hearings. David H. Tollner, Esq., Sarah Fairchild, Esq., and Maureen Tabari, Esq. appeared on behalf of Student. Sarah Garcia, Esq. and Ryan Tung, Esq. appeared on behalf of Morgan Hill Unified School District. The prehearing conference was recorded.

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

1. Motion to Continue Hearing Dates. Pursuant to a joint request for continuance filed by the parties on December 18, 2014, OAH on December 19, 2015, continued the hearing of this matter to April 1, 2015, continuing day-to-day, Monday through Thursday, until completion of the hearing. On March 11, 2015, District filed a “notice of unavailability,” treated here as a motion for continuance, stating that District’s unnamed representative and unnamed critical witness would be unavailable from April 6 through 10, 2015, due to previously-scheduled travel, and requesting that no hearing days be scheduled during that time. District did not include supporting declarations or citations to authorities. On March 18, 2015, Student filed an opposition with supporting declaration to District’s notice, on grounds that the parties had agreed to an April 1, 2015 hearing start date on December 18, 2015, confirmed that date again on January 22, 2015, and Student’s counsel had cleared his calendar from April 1 through 10, 2015, in reliance on those confirmations. Student’s counsel declared that his calendar from April 12 through June 8, 2015, was filled with other matters of unspecified description and date.

District's motion to continue hearing dates was heard on the record and each party presented oral argument with respect to its position. District identified the unavailable District representative as Rose DuMond, and the unavailable witness as Santina Ceja, and indicated that they, and perhaps other witnesses, would be unavailable from April 6 through 10, 2015 because those dates fell within District's Spring vacation.

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

After hearing both parties and considering all relevant facts and circumstances, good cause was not established for a continuance of the hearing. Procedurally, District's motion was not supported by declarations or citations to authority. Substantively, the matter has been set since December 19, 2015, for hearing commencing on Wednesday, April 1, 2015, and both parties were aware that the matter would need to continue into the week of April 6 - 10, 2015. Neither the Individuals with Disabilities Education Act nor the Education Code provide for suspension of hearing during school holidays. Further, the unavailability of witnesses DuMond and Ceja may be accommodated by adding a Friday hearing day on April 3, 2015, and scheduling their testimony for the first three days of hearing.

Accordingly, District's motion for continuance is denied. As detailed below, the matter is set for hearing on April 1-3, 20-15 and April 7-9, 2015, and the parties are ordered to call witnesses DuMond and Ceja and complete their direct and cross-examination on April 1-3, 2015.¹

District was given leave to file and serve a formal motion for continuance, supported by declaration and citation to authorities, on or before March 25, 2015 at 4:00 p.m., with Student to file a response no later than March 27, 2015 at 4:00 p.m.

¹ While the parties discussed with the ALJ at the PHC having a April 6, 2015 hearing date, that date is not available due to OAH's scheduled monthly staff meeting.

2. Hearing Dates, Times, and Location. The hearing in these matters shall commence on Wednesday, April 1, 2015, and continue on April 2-3 and 7-9, 2015, continuing day-to-day thereafter as needed at the discretion of the ALJ. Unless otherwise ordered, the hearing shall begin at 1:30 p.m. on April 1, 2015, and at 9:00 a.m. all other days, and end each day at 5:00 p.m.

At the PHC, District indicated that District's offices may be unavailable as a hearing location from April 6-10, 2015 due to District's Spring vacation. The hearing shall take place on April 1-3 at District's offices located at 15600 Concord Circle, Morgan Hill, CA 95037. No later than 5:00 p.m. on Friday, March 25, 2015, District shall notify Student and OAH whether District's offices will be available as a hearing location for the week of April 6-10, 2015, and, in the event that district's offices are unavailable, shall identify an alternate hearing location within 10 miles of District's offices to be arranged by District and provided at District's expense (if any).

District shall 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 .), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. At a minimum, District shall provide a hearing room with separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for the District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. District shall ensure that all parties, witnesses and the ALJ have drinking water and tissue available to them, and that the hearing room and other facilities which will be used during the hearing are accessible.

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.

3. Issues and Proposed Resolutions. The issues at the due process hearing are those alleged in Student's and District's separate requests for due process hearing (complaints).² As necessary, the issues have been clarified and reframed for clarity, as set forth herein below:

² Any issue(s) not identified in the complaints, and/or permitted by this order, shall be included only upon OAH granting a motion to amend the complaint. All amendments to the complaints shall comply with the requirements of California Education Code section 56502, subdivision (e), and such amendment will restart all applicable timelines for the due process hearing in this matter. (20 U.S.C. § 1415(c)(2)(E)(ii).)

STUDENT'S ISSUES

Did District deny Student a free appropriate public education (FAPE):

1. By failing to offer appropriate transition supports and services to Student in Student's May 23, 2013 IEP to support his transition into high school?

During Student's the 2013-2014 school year, did District deny Student a FAPE:

2. By failing to offer appropriate behavior interventions and supports in Student's November 19, 2013 individualized education program?
3. By failing to implement Student's November 19, 2013 IEP?
4. By failing to offer and provide appropriate mental health services during Student's the 2013-2014 school year?
5. By failing to offer appropriate placement and services at Student's May 13, 2014 IEP to address Student's academic and emotional needs?
6. By failing to offer appropriate placement and services at Student's June 5, 2014 IEP to address Student's academic and emotional needs?
7. By failing to offer appropriate placement and services at Student's June 30, 2014 IEP to address Student's academic and emotional needs?

During the 2014-2015 school year, did District deny Student a FAPE:

8. By offering Student inappropriate temporary diagnostic residential placement at Provo Canyon School instead of stay put placement at that school in Student's August 20, 2014 IEP
9. By refusing to develop new goals for Student in Student's August 20, 2014 IEP?
10. By failing to offer Student continued placement at Provo Canyon School at Student's the October 31, 2014 IEP team meeting?
11. By failing to inform Parents that Student's October 31, 2014 IEP was Student's triennial IEP, and thus depriving Parents their rights to meaningfully participate in the IEP development process?
12. By placing an inappropriate district payment limit of \$3,000 for an IEE requested by Student with respect to May 30, 2014 Miri Center Assessment of Student's need for educationally-related mental health services?

DISTRICT'S ISSUE

Was District's October 29, 2014 psychoeducational assessment of Student appropriate such that Student is not entitled to a psychoeducational independent evaluation at public expense?

4. Exhibits. Student as of the PHC had identified 157 exhibits that Student intended to present at hearing. District has identified 19 Exhibits that it intends to present at hearing. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall mark Student's exhibits using the numbers S1, S2, S3, etc., and District shall mark its exhibits using numbers D1, D2, D3, etc. Each exhibit shall be internally paginated by exhibit, or all of a party's exhibits shall be sequentially Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, in addition to its own copy of its exhibits and the copy exchanged with the other party, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and an exhibit binder for use by witnesses (*i.e.*, each party should make at least an original and three copies of its exhibits to exchange and to use at the hearing). 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. Each party will include in its exhibits current resumes of its expert witnesses, and current resumes of any of its percipient witness whose education and employment are expected to be subjects of direct examination.

5. Witnesses. Student as of the PHC had identified 33 percipient witnesses and two expert witnesses that Student intended to present at hearing. District as of the PHC had identified 18 percipient witnesses, 13 of whom were also identified by Student, and no additional expert witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. District agreed that it would make witnesses under its control reasonably available to Student on April 1 through 3, 2015, without the need for subpoena. District declined to make District employees available to available to Student for the period from April 6 through 10, 2015 on grounds that it could not direct District employees to appear during their vacation. District will also inform Student of the identity of, and available contact information for, any witness identified by Student as an employee of District who has left District's employ, by 5:00 p.m. on Thursday, March 26, 2015. The parties will 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.

6. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), requires each party to disclose, at least five business days prior to the hearing, a list of all witnesses and their general area of testimony that the parties intend to present at the hearing, and a copy of all documents, including all assessments completed by that date and recommendations based on the assessments, that the parties intend to use at the hearing. In light of the Caesar Chavez holiday on March 31, 2015, the parties stipulated to

an exchange of final witness lists and exhibit binders by 5:00 p.m. on Wednesday, March 25, 2015. Witnesses and documents not disclosed on or before March 25, 2015 may be excluded at the request of the other party from introduction at the hearing. Each party reserves the right to present additional witness and documents for purposes of rebuttal.

7. Order of Presentation of Evidence. In these consolidated matters, Student shall present his case first followed by District. If a witness is to be called by both parties, each counsel shall be prepared to conduct all direct and cross examination of the witness. Witnesses will not be recalled, unless it is to rebut testimony offered by other witnesses who appeared after the witness in question.

8. Telephonic Testimony. Student requested leave to offer telephonic testimony from three witnesses residing in Utah and employed at Provo Canyon School: (REDACTED). District requested leave to offer telephonic testimony from District employee (REDACTED), on grounds of a medical condition that might make it impossible for her to appear personally. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Both requests are granted. Student shall provide proposed witness (REDACTED) 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. District shall do likewise with respect to witness (REDACTED). No witness will be heard by telephone unless all these requirements have been fulfilled.

9. Meet and Confer Regarding Witnesses and Possible Stipulations. The parties are ordered to meet and confer on Thursday, March 26, 2015 at 2:00 p.m. regarding the schedule of witnesses for the hearing. Student's counsel for the hearing will place the telephone call to District's counsel to initiate the meet and confer. The parties are 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 parties shall discuss a time estimate of the length of each witness's direct examination testimony, and identify those witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.

On the first day of hearing, before the first witness testifies, the parties shall provide the ALJ with one detailed hour-by-hour schedule of all witnesses expected to testify at the hearing, which list shall also include an estimate of time for each party's direct and cross-examination. 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 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Stipulations to pertinent facts,

contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

10. 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.

11. Motions. As noted above, District has leave to file and serve a formal motion for continuance, supported by declaration and citation to authorities, on or before March 25, 2015 at 4:00 p.m., with Student to file a response no later than March 27, 2015 at 4:00 p.m. No other motions are anticipated. In the event that any motion other than a challenge to a newly-assigned ALJ for the hearing is brought after this date, it 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 PHC.

12. Special Needs and Accommodations. No accommodations for parties or witnesses were requested. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

13. 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.

14. Audio Recording. District's motion to record the proceeding is granted. The following conditions apply to any recording: (i) OAH's recording is the only official recording; (ii) the recorder will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; and (iii) the operation of the party's recording mechanism will not be allowed to delay the hearing. Both parties may record the proceedings.

15. 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.

16. Hearing Closed To the Public. The hearing will be closed to the public.

17. Settlement. The parties are encouraged to continue working together to complete 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 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 AND SHALL 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. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

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

IT IS SO ORDERED.

DATE: March 25, 2015

/s/

ROBERT MARTIN
Administrative Law Judge
Office of Administrative Hearings