BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. RIVERSIDE COUNTY OFFICE OF EDUCATION AND RIVERSIDE UNIFIED SCHOOL DISTRICT.	OAH CASE NO. 2013010137 ORDER FOLLOWING PREHEARING CONFERENCE; ORDER DENYING BIFURCATION OF THE HEARING

On May 6, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Daniel Shaw, Attorney at Law, appeared on behalf of Student. Jack B. Clarke, Jr., Attorney at Law, appeared on behalf of Riverside Unified School District (RUSD) and Riverside County Office of Education (RCOE).[1] The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The due process hearing shall take place on May 13 – 16, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for May 13, 2013, when the hearing shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place at RUSD's offices, located at 5700 Arlington Avenue, Riverside, California, 92504.[2]

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.

[1] On February 21, 2013, OAH granted the motion of RUSD and RCOE to bifurcate this proceeding and to hear Student's issues for hearing against RUSD and RCOE separately than those against Sacramento County Office of Education and Sacramento City Unified School District.

[2] At a minimum, the 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 RUSD's and RCOE's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. RUSD shall ensure that all parties and the ALJ have drinking water and tissue available to them.

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.

Issue 1: During the 2010-2011 and 2011-2012 school year (SY's), did RUSD and RCOE deny Student a free appropriate public education (FAPE) by failing to:

a) Offer Student an educational placement that met his unique needs;

b) Offer Student adequate mental health services;

c) Offer adequate extended school year (ESY) services;

d) Develop a positive behavior support plan;

e) Provide an intensive reading program;

f) Provide a positive behavior support plan (BSP);

g) Provide adequate, measurable goals in all areas of need;

h) Provide accommodations and modifications; and

i) Implement Student's individualized educational program (IEP)?

Issue 2: During SY's 2010-2011 and 2011-2012, did RUSD violate Parent's and Student's procedural rights, which prevented Parents from meaningfully participating in Student's educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to make a clear offer of services?

Issue 3: During SY's 2010-2011 and 2011-2012, did RCOE violate Parent's and Student's procedural rights, which prevented Parents from meaningfully participating in Student's educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to:

a) Hold a timely individual educational program (IEP) meeting within 30 days of Student's placement; and

b) Failing to complete assessments required pursuant to an assessment plan?

Issue 4: During SY 2011-2012, did RUSD deny Student a FAPE by failing to assess him in all areas of suspected disability by failing to conduct adequate social-emotional and communication assessments?

Proposed Resolutions: Student requests that RUSD and RCOE provide him with compensatory education in the form individualized tutoring, behavioral services, social skills training, mental health services, and an intensive reading program, like Lindamood Bell. Additionally, RUSD and RCOE shall pay for private independent assessments in the areas of social-emotional and speech and language, and pay for the private assessors to attend an IEP team meeting to discuss the assessment.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. RUSD and RCOE shall prepare a joint evidence binder. 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 RUSD/RCOE exhibit (for example, "S-5, S-6", "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. In compliance with Education Code section 56505, subdivision (e)(7), the parties shall exchange exhibits by 5:00 p.m., on May 6, 2013. 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 May 9, 2013, as to the schedule of witnesses, when a party expects a witness to testify, and have agreed 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. By 1:00 p.m. on May 10, 2013, each party shall serve on the other party and on the ALJ, the final witness list, including the anticipated order of the witnesses to be called at the hearing, an estimate of the length of time for the direct examination of each witness the party actually intends to call, along with time estimates for the testimony of any additional

witnesses the party may call, depending on the flow of the hearing and the evidence.[3] Prior to 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.

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.

Student's motion to allow Dr. Paula Solomon to testify telephonically is granted. Student shall provide Dr. Solomon with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing, and RUSD shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student, RCOE and then RUSD. If a witness if to be called by more than one party, the parties shall conduct direct and cross-examination so that the witness need only testify once.

8. Motions. On May 1, 2013, RUSD and RCOE filed a joint motion to bifurcate the due process hearing to have separate hearings against RUSD and RCOE because of different witnesses, evidence and time periods involved as to RUSD and RCOE. On May 6, 2013, Student submitted a written response. The parties gave additional oral argument on the motion at the PHC.

[3] Parties shall not mail a hard copy of any document to OAH that has already been filed by facsimile transmission.

Federal and state law pertaining to special education due process administrative proceedings do not contain specific references to the procedure for bifurcating issues at 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).)

RUSD and RCOE did not establish good cause to bifurcate issues for hearing that involve RUSD from those issues that pertain to RCOE for judicial economy as these matters do not involve sufficiently distinct periods of time, evidence, witnesses and relief if Student prevails. Accordingly, RUSD's and RCOE's motion to bifurcate is denied.

No further pre-trial 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 6, 2013.

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. Recording of Hearing. The parties' request to audio tape the hearing is granted. The recording by OAH shall be official record of the hearing and no stoppages of the hearing will be granted to accommodate the parties' recording, and parties must cease recording when the ALJ informs the parties that the matter is off the record.

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 during the hearing unless permission to the contrary is obtained from the ALJ.

12. Compensatory Education. 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. A Spanish language interpreter is required for Student's father. If Father will not be attending the hearing, Student shall inform OAH, RUSD and RCOE by 1:00 p.m. on May 9, 2013.

At present, neither party anticipates the need for any further special accommodation for any witness or party, or for translation services.

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

15. 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 business days or fewer 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. 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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST BUSINESS 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. The ALJ will check for messages the evening prior to the hearing and the morning of the hearing.

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

IT IS SO ORDERED.

Dated: May 6, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings