BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. SAN LORENZO UNIFIED SCHOOL DISTRICT.	OAH Case No. 2015091115 ORDER DENYING REQUEST TO SUBMIT SUPPLEMENTAL DOCUMENTARY EVIDENCE

PROCEDURAL HISTORY

Student filed a due process hearing request with the Office of Administrative Hearings, State of California, on September 25, 2015, naming San Lorenzo Unified School District as respondent. Administrative Law Judge B. Andrea Miles heard this matter in San Lorenzo, California, on November 19, 23, and 24, 2014 and December 1 and 3, 2015. Both Student and San Lorenzo were represented by legal counsel throughout the proceedings.

A continuance was granted for the parties to file written closing arguments and the record remained open until December 29, 2015 for receipt of closing arguments. On December 16, 2015, Student filed a Request to Submit Supplemental Evidence, a declaration from Student's mother, and a copy of Student's most recent first grade report card. Student is seeking to have Student's most recent report card entered into evidence on the theory that it rebuts testimony of San Lorenzo's witnesses. On December 21, 2015, San Lorenzo submitted its opposition to Student's request. On that same day, Student submitted a response to San Lorenzo's opposition.

FACTUAL FINDINGS

Student seeks to admit a copy of Student's report card which covers the time period beginning August 25, 2015 and ends November 20, 2015. In Mother's declaration she indicates that she received the report card from Student's teacher, Ms. Phillips, on December 11, 2015. Nothing in Mother's declaration indicates that this was the first time that she was provided access to Student's report card.

During the hearing, Student, who bears the burden of proof in this case, chose not to call Alex Phillips or Claire Colt as witnesses for the Student. Ms. Phillips was Student's teacher during the 2015-2016 school year, the time period covered by the report card, which

Student seeks to have admitted as evidence. Ms. Colt, a mentor teacher, worked closely with Ms. Phillips in Student's classroom during that same time period. Either of these witnesses would have been able to testify about Student's academic performance and classroom conduct during the 2015-2016. Student included both of these witnesses on his proposed witness list, which was submitted as part of her November 12, 2015 Prehearing Conference Statement. However, at the hearing, Student's counsel made it clear that she was not calling either of those witnesses during her case in chief.

Although initially San Lorenzo indicated that it intended to call Ms. Phillips as a witness during the hearing, it elected not to call her. On Tuesday, December 1, 2015, San Lorenzo's counsel indicated that she only intended upon calling two more witnesses, neither of which were Ms. Phillips or Ms. Colt. The hearing scheduled to conclude on December 3, 2015. Student indicated that she intended upon calling two rebuttal witnesses, neither of which were Ms. Phillips or Ms. Colt, but that one of those witnesses was not available until December 3, 2015. On the basis of Student's representation, at the end of December 1, 2015, the case was continued to December 3, 2015 so that San Lorenzo could conclude its case and Student could present his rebuttal witnesses. After San Lorenzo concluded its case, Student called one rebuttal witness, Carina Grandison, but made no request to call either Ms. Phillips or Ms. Colt.

During the hearing, San Lorenzo's witness, Carmen Conchola, who Student cites as one of the witnesses whose testimony he is seeking to rebut through the introduction of the report card, testified. In Student's motion and response to San Lorenzo's opposition, Student's counsel mischaracterizes Ms. Conchola's testimony. Ms. Conchola testified that at the request of Student's teacher, she observed Student during the third week of the 2015-2016 school year for approximately 30 to 35 minutes. Ms. Conchola is a special education teacher with San Lorenzo and had no other contact with Student besides that observation.

Student's counsel asserts that Ms. Conchola testified that Student was performing at grade level and that it was normal for a first grade student not to be able to read or write. At no point did Ms. Conchola provide that testimony. Instead, Ms. Conchola testified that students learn to read at different rates and that she did not find it unusual if Student was not yet reading during the third week of first grade. Ms. Conchola also testified that she observed Student use scissors to cut out part of a project and him write his name legibly. During her testimony, Ms. Conchola shared that during a Section 504 meeting, Ms. Colt expressed concerns that Student was functioning below grade level and that during that same meeting Ms. Conchola shared her notes from her observation of Student in class. Student's mother was present at that meeting and so would have been aware of Ms. Conchola's opinion as wells as Ms. Colt's voiced concerns. Additionally, Mother testified at the hearing, that she believed that Student was not performing well academically during the 2015-2016 school year.

Student's counsel made a strategic decision not to call Ms. Phillips or Ms. Colt as witnesses, although counsel was aware that either Ms. Phillips or Ms. Cold would be in the best position to provide evidence on Student's academic performance and class behavior for

the 2015-2016 school year. In her motion, Student's counsel implied that she did not call Ms. Phillips as a witness because she believed that San Lorenzo intended upon calling her as a witness. Student bears the burden of proof in this matter, thus, it is not the responsibility of San Lorenzo to provide Ms. Phillip's testimony if it was needed to bolster Student's case. When Student's counsel learned that San Lorenzo was not calling Ms. Phillips, she could have requested to reopen her case to call Ms. Phillips or provide an offer of proof that Ms. Phillips was being offered as rebuttal testimony. Student's counsel chose to do neither.

Student also asserts, that the report card should be admitted because it rebuts the testimony of Nicole Saleta, a school psychologist with San Lorenzo, who performed an a psychoeducational assessment of Student in October 2014, and the testimony of Merle Barkan, a speech and language pathologist with San Lorenzo, who performed a speech and language assessment of Student in October 2014. Those assessments predated the time period addressed in the report card by nearly one year which addressed Student's academic performance during the first half of the 2015-2016 school year. As such, the hearsay information contained in the report card could not be used to rebut Ms. Saleta's or Ms. Barkan's testimony.

LEGAL CONCLUSIONS

Special education law does not address the reopening of the evidentiary record after the hearing. Using civil law principles as guidance, the reopening of a case to receive additional evidence is generally a matter within the trial court's discretion. (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208, citing *Rosenfeld, Meyer & Susman v. Cohen* 191 Cal.App. 3rd 1035, 1052-53.) In this case, at the end of the evidentiary proceedings, the case was continued so that the parties could submit closing briefs. This continuance was in no way an invitation for the parties to submit additional evidence for consideration.

Education Code section 56505, subdivision (e)(7), requires the parties to a special education dispute to disclose their documents to each other at least five business days prior to the hearing. Education Code section 56505.1, subdivision (f), authorizes the ALJ hearing the case to bar introduction of any documents not disclosed to the other party, without the consent of the other party, as required by section 56505, subdivision (e)(7). In the matter at hand, the parties entered into a stipulation to extend the deadline for the exchange of evidence to no later than November 16, 2015. The Order Following Prehearing Conference, issued on November 13, 2015, advised the parties that failure to comply with the order may "result in exclusion of evidence or other sanctions."

In his motion, Student compares the situation at hand to one decided in one of OAH's prior orders[1]. Prior rulings by OAH are not considered precedent and therefore need not be followed in subsequent case. Regardless, *Student v. Cupertino Union School District,* OAH Case No. 2012020850 is entirely distinguishable from the case at hand. In that case, at the

[1] (Student v. Cupertino Union School District, OAH Case No. 2012020850).

end of the hearing, Student requested to keep the hearing record open so that Parent could submit copies of payment receipts to support Student's request for reimbursement because Parent did not have copies of the receipts at that time. The administrative law judge denied Student's request and instructed the parties that if either wanted to move to submit more documents, the requesting party should include a declaration under penalty of perjury as to reason the documents had not been disclosed to the other party in compliance with the law, and presented at hearing. But more importantly, the receipts in that case were necessary evidence to establish of the expenses for reimbursed of expenses paid by Student's parents.

In the case at hand, Student did not make a motion at the end of the hearing to leave the record open even though he was aware that a report card would be forthcoming. In this case, Student had the option of presenting the better evidence of testimony of Ms. Phillips or Ms. Colt to establish Student's academic performance and behavioral performance during the 2015-2016 school year. However, Student chose not to do so.

Additionally, in *Cupertino* the supplementary evidence was limited to the remedies portion of the hearing, whereas, in this case the Student seeks to use the report card as evidence in proving the ultimate issues in the case. The receipts in the Cupertino case merely supplemented the student's father's testimony, but here, Student wants to transform the hearsay evidence contained in the report card to direct evidence of Student's academic performance without providing any supporting evidence.

The report card at issue in this case is a document which contains hearsay statements. Although hearsay is admissible in special education hearings, no factual finding may be made solely on a hearsay statement and must be supported by other direct evidence. (Cal. Code Regs., tit. 5 § 3082, subd. (b).) The report card contains more than just a written statement by Student's teacher, whose name does not even appear on the report card, it contains her opinions and a measure of Student's progress in class. The report card uses a number system and letter system to denote Student's progress. Without a key that explains the meaning of the letters and numbers, the report card lacks context. Additionally, the basis for the opinions in the report card requires explanation to be relevant to the issues in this case.

Student argues that the report card is an exception to the hearsay rule, because Student seeks to admit the evidence as rebuttal to the testimony of Ms. Conchola, Ms. Saleta, and Ms. Barkan. However, Student fails to recognize that when hearsay evidence is allowed into evidence through the exception of impeachment or rebuttal, the evidence remains hearsay and may only be used to disprove the validity of the prior evidence.

Finally, the admission of the supplemental evidence would prejudice San Lorenzo by denying it the opportunity to provide additional evidence to explain or contradict the opinion

contained in the report card. For this reason and those referenced above, Student's motion to admit supplemental evidence is denied.

DATE: December 23, 2015

/s/
B. ANDREA MILES
Administrative Law Judge
Office of Administrative Hearings