BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. CONTRA COSTA COUNTY OFFICE OF EDUCATION AND CONTRA COSTA COUNTY PROBATION DEPARTMENT.	OAH CASE NO. 2013080471 ORDER FOLLOWING PREHEARING CONFERENCE

On October 21, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Mary-Lee Kimber Smith, Kara Janssen and Brittany A. Sachs, Attorneys at Law, appeared on behalf of Student. Christina Ro-Connolly, Attorney at Law, appeared on behalf of Contra Costa County Probation Department (Probation). 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 October 28, 2013 through November 1, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for October 28, 2013, on which day the hearing shall start at 1:30 p.m., unless otherwise ordered.[1] The hearing shall take place at Probation's office at 202 Glacier Drive, Martinez, California 94553.[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. 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] This matter shall be heard concurrently with OAH Case. No. 2013080449.

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

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

Issue 1: During those times in which Student was in the security program and Probation prevented Student from receiving education services from the Contra Costa County Office of Education (CCCOE), from June 25, 2012 through July 2, 2012 and July 19, 2013 through August 7, 2012, did Probation deny Student a free appropriate public education (FAPE) by not providing comparable services to the extent practicable Student's last agreed upon and implemented educational program without first obtaining parental consent?

Issue 2: During those times in which Student was in the security program and Probation prevented Student from receiving education services from CCCOE, from on or about May 7, 2012 through October 5, 2012, November 7, 2012 through January 7, 2013, and January 28, 2013 through October 16, 2013, did Probation fail to develop an individualized education program (IEP) that met Student's unique needs because Probation failed to:

a) Consider a continuum of placements to meet her unique needs;

b) Failed to offer Student special education services to meet her unique needs, including specialized academic instruction, mental health services and counseling and behavior services;

c) Did not establish measurable goals to meet Student's unique needs in the areas of behavior; and

d) Failed to develop a plan to meet Student's behavioral needs?

Issue 3: During those times in which Student was in the security program and Probation prevented Student from receiving education services from CCCOE, from on or about May 7, 2012 through October 5, 2012, November 7, 2012 through January 7, 2013, and January 28, 2013 through October 16, 2013, did Probation deny Student a FAPE by failing to assess her in all areas of suspected disability?

Issue 4: During those times in which Student was in the security program and Probation prevented Student from receiving education services from CCCOE, from August 7, 2012 through October 5, 2012, November 7, 2012 through January 7, 2013, and January 28, 2013 through October 16, 2013, did Probation deny Student a FAPE by failing to implement her IEP's?

Issue 5: From May 7, 2012 through October 5, 2012, November 7, 2012 through January 7, 2013, and January 28, 2013 through October 16, 2013, did Probation deny Student a FAPE by failing to:

a) Have qualified personnel provide Student with special education services;

b) Convene IEP team meetings when Student did not meet her IEP goals;

c) Provide Student with special education services; and

e) Conduct a functional behavior assessment as his disciplinary conduct was related to his disability?

Proposed Resolutions: Student requests that Probation provide special education services as set forth in his IEP when Probation prevents CCCOE from providing him with special education services, and training to Probation staff as to their duties to provide special education services. Student also requests compensatory education in areas of group and individual mental health counseling, including family counseling, positive behavior intervention services and educational therapy, plus transportation to these compensatory 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 "C" in front of the exhibit to designate if it is a Student or Probation exhibit (for example, "S-5, S-6", "C-1, C-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 agree to exchange exhibits by 5:00 p.m., on October 29, 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 October 24, 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 October 25, 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).) 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 Peter Leone, Ph.D., to testify telephonically is granted. Student shall provide Dr. Leone with a complete exhibit binder from each party, 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. Student's motion to permit the education rights holder to testify by telephone is denied as Student did not establish good cause.

7. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: OAH Case. No. 2013080449, Student and then Probation. 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. Probation stated that it intends to file a pretrial motion whether Student adequately pled as a proposed resolution a request for mental health services. No further pretrial motions are pending or contemplated. Any other motion filed after this date

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

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 October 21, 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. 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.

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. Probation shall ensure that the hearing location and table for Student's legal counsel is wheelchair accessible.

13. Hearing Closed To the Public. At the request of the educational rights holder, the hearing will be closed to the public.

14. 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.

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

IT IS SO ORDERED.

Dated: October 22, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings