BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: GUARDIAN ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT AND TOBINWORLD II,	OAH Case No. 2013100534
GUARDIAN ON BEHALF OF STUDENT, v. OAKLAND UNIFIED SCHOOL DISTRICT AND TOBINWORLD II.	OAH Case No. 20131120827 CORRECTED ORDER FOLLOWING PREHEARING CONFERENCE, DISMISSING A PARTY, AND GRANTING CONTIUANCE[1]

On February 10, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Margaret M. Broussard, Office of Administrative Hearings (OAH). Cleo Simon, Legal Guardian, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of the Oakland Unified School District (Oakland). Alejandra Leon, Attorney at Law, and John Rusk, Oakland representative, were present as well. The PHC was recorded.

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

1. Motion to Dismiss. In OAH case number 20131120827, Guardian named both Oakland and Tobinworld II, a non-public school (NPS), as respondents. Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to "the public agency involved in any decisions regarding a pupil." (Ed. Code, § 56501, subd. (a).) A "public agency" is defined as "a school district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs." (Ed. Code, §§ 56500 and 56028.5.) In this case, Tobinworld II, an NPS, is not a public agency and is not a proper respondent. Tobinworld II is dismissed from this consolidated matter.

[1] The only change in this corrected order is to remove editing marks in the caption.

2. Motion to Continue. At the beginning of the PHC, the attorney for Oakland asked for a short continuance due to the serious illness of a family member. Student opposed the continuance. 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).) Good cause being shown, the motion was granted and the hearing will proceed on the dates listed below.

3. Hearing Dates, Times, and Location. The hearing shall take place at the **Oakland Office of Administrative Hearings, 1515 Clay Street, Suite 206, Oakland, CA 94612.** It shall take place on March 24, 25, 26, and 27, 2014, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On March 24, 2014, the hearing shall begin at 1:30 p.m. and end at 5:00 p.m., and on the remaining days the hearing shall begin at 9:00 a.m. and end at 5:00 p.m., 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.

4. Issues and Proposed Resolutions. The issues below were discussed at the PHC and have been reworded for clarity.

Issues

Issue 1 – Did Oakland deny Student a free appropriate public education (FAPE) by committing the procedural violation of holding an individualized education program (IEP) team meeting on May 19, 2012, without Guardian which denied the Guardian the right to meaningfully participate in the IEP process?

Issue 2- Did Oakland deny Student a FAPE by failing to provide Guardian a complete copy of Student's educational records within five business days of Guardian's request on September 19, 2012, and December 19, 2012?

Issue 3- Did Oakland deny Student a FAPE by failing to perform assessments in the areas of occupational therapy, including sensory therapy, and assistive technology pursuant to Guardian's request?

Issue 4- Is Student entitled to an independent educational evaluation in the areas of occupational therapy, including sensory therapy, and assistive technology because Oakland failed to respond to Guardian's request for independent educational evaluations in these areas?

Issue 5 – Did Oakland deny Student a FAPE when it agreed to perform independent psychological and educational evaluations but would not agree to fund the assessments by the Guardians' choice of assessor, Dr. Cynthia Peterson?

Issue 6 – Did Oakland deny Student a FAPE by failing to hold a 30-day placement IEP team meeting after Student's placement at Tobinworld II, an NPS, on May 7, 2013?

Issue 7 – Did Oakland deny Student a FAPE by failing to assess Student for Oakland's reading clinic and failing to provide reading specialist services from December 19, 2012, forward?

Issue 8 – Did Oakland deny Student a FAPE by committing a procedural violation which denied Guardians the right to meaningfully participate in the IEP process at the November 6, 2013 IEP team meeting by:

a. failing to have a school site administrator at the meeting;

b. failing to have Mr. Michael Williams, who drafted a behavior plan, at the meeting;

c. failing to have anyone at the meeting who understood the proposed behavior support plan?

Issue 9 – Did Oakland deny Student a FAPE by failing to provide adequate transportation services by:

a. picking up Student late in the morning causing Student to be late for school and miss instruction;

b. driving too fast when the van was running late;

c. extending Student's ride home in the afternoon to up to 2.5 hours;

d. allowing Student off the van to use the restroom at a fast food restaurant;

e. playing inappropriate rock and rap music in the van when Student was present;

f. improperly supervising Student on the van resulting in Student sustaining an injury staff was not aware of; and

g. retaliatory behavior by the van drivers after issues were brought to their attention?

Proposed Resolutions

a. Provide the Guardians with a complete copy of Student's records within five business days.

b. Oakland should be ordered to fund independent educational evaluations in the areas of occupational therapy, including sensory therapy, and assistive technology.

c. Oakland should be ordered to fund independent psychological and educational assessments with the Guardians' choice of assessor, Dr. Cynthia Peterson.

d. Order Oakland to convene an IEP team meeting.

e. Oakland should be ordered to provide an assessment to determine whether Student needs a reading specialist and if the assessment determines that Student does need one, Oakland should be ordered to provide the reading specialist services to Student.

f. Other such relief as the ALJ finds appropriate.

5. 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 pages of a party's exhibit binder shall be Bates-stamped or otherwise consecutively numbered. 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 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 a written declaration under penalty of perjury, and the ALJ rules that it is admissible.

6. Witnesses.

a) Each party is responsible for procuring the attendance at hearing of its own witnesses. 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, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student has identified 13 witnesses to be called at the hearing, and Oakland has identified 8 witnesses. Some of the witnesses are listed by both parties. In light of the fact that three days have been scheduled for the hearing, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and on OAH 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. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. 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 their testimony.

7. 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. 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.

8. Telephonic Testimony. 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.

9. Electronic Recording of Hearing.

a. Audio Recording. At present, Oakland intends to make an audio recording of the hearing. Both parties were granted permission to record the hearing. The following

conditions apply to any recording: 1) that OAH's recording is the only official recording; 2) that the recorder 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) the 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.

10. Motions. At this time, Oakland indicated that it may make a prehearing motion regarding the statute of limitations as it pertains to a request for an independent educational evaluation. No other 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.

11. Compensatory Education and 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. Any party seeking compensatory education shall provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

12. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

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. Special Needs and Accommodations. At present neither party anticipates the need for any special accommodation for any witness or party.

15. Hearing Open To the Public. At the request of Guardians, the hearing will be open to the public.

16. 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 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.

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.

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

IT IS SO ORDERED.

DATE: March 18, 2014

/s/
MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings