BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. BALDWIN PARK UNIFIED SCHOOL DISTRICT, COVINA VALLEY UNIFIED SCHOOL DISTRICT	OAH CASE NO. 2012031078
BALDWIN PARK UNIFIED SCHOOL DISTRICT, COVINA VALLEY UNIFIED SCHOOL DISTRICT v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2012070228 ORDER FOLLOWING PRE-HEARING CONFERENCE AND DENYING STUDENT'S MOTION TO DISMISS DISTRICTS' COMPLAINT

Administrative Law Judge (ALJ) Adrienne L. Krikorian, Office of Administrative Hearings (OAH) held a prehearing conference (PHC) on March 4, 2013 in this consolidated matter. Attorney David Grey appeared on Student's behalf. Attorney Meredith Reynolds appeared on behalf of Baldwin Park Unified School District (BPUSD). Attorney Geneva Engelbreit appeared on behalf of Covina Valley Unified School District (CVUSD). The two districts are sometimes referred to collectively as "Districts." The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The parties stipulated to continue the hearing dates. The hearing shall be held on March 12, 13, 14, 18, 20, and 21, 2013, and shall continue day to day Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin at 10:00 a.m. on the first day and at 9:30 a.m. on all other days unless otherwise ordered.

The parties stipulated to the location of the hearing. The hearing shall take place at CVUSD's offices located at 519 East Badillo Street, Covina, California 91723. CVUSD shall provide a hearing room dedicated to the hearing for all days of hearing and shall insure that Student's parents, Student's counsel, and the ALJ have access to parking.

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.

2. Issues and Proposed Resolutions.

A. Student's Motion to Add an Additional Issue, or Amend. In his amended PHC statement filed on March 1, 2013, Student requested that OAH include the following as a separate issue for hearing: "Whether Student should be referred to the California School for the Deaf in Riverside (CSD) pursuant to Education Code §§ 56326, 59020 and California Code of Regulations, Title 5, Sections 17660-17663." The ALJ gave all parties an opportunity to argue their positions on the addition of this issue.

Student contends the new issue can be inferred from the pleadings in the Third Amended Complaint and that it should be decided separate from, and without consideration of, whether the districts denied student a free appropriate public education (FAPE). Districts opposed the addition of the issue, asserting that the issue is a new issue that was not included in the Third Amended Complaint, and that it constitutes an untimely motion to amend, which, if granted, would further delay hearing on Student's case, which was originally filed in March 2012.

Even when considered in the context of the rules of liberal construction in pleadings, Student's proposed new issue is not pleaded as an issue in the Third Amended Complaint. In "Problem 1" of Student's Third Amended Complaint, Student alleges that Student's parents requested at the 2011 individualized education program (IEP) team meeting a referral to CSD, that the IEP team was required by Education Code section 56345 and Title 20 U.S.C. section 1414(d) to consider the special communication needs of a student due to a hearing loss, that the IEP team did not consider the factors required in the applicable statutes, and failure to consider these factors was "a denial of FAPE." (Complaint, page 4, line 24.) Problem 2, at page 5, lines 9 through 19, similarly alleges that Districts refused to discuss appropriate placement options at the 2012 IEP meeting, the IEP team failed to consider the factors specified in Education Code section 56345 and Title 20 U.S.C. section 1414(d), and those failures were a "denial of FAPE." (Complaint, page 5, lines 18-19.) Nowhere in Problems 1 or 2 does Student allege as a separate issue that, notwithstanding the requirements of the Individuals with Disabilities Education Act (IDEA) related to placement and least restrictive environment (LRE), that Districts violated a statutory duty under California law to refer Student to the CSD regardless of whether or not the placement offered by the 2011 and 2012 IEP teams constituted a FAPE in the LRE.

Additionally, Student did not seek leave to file a Fourth Amended Complaint and he specifically stated during the PHC that he was not seeking leave to amend. Without reaching the merits of Student's "non-FAPE" claim, and assuming Student's request was a request to amend the pleading, the request is denied. This matter has been pending for a year, and

Student has amended his pleading three times. The facts related to Student's proposed claim were known to him at the time he first filed his complaint, were also the same facts upon which he based his second and third amended pleadings, and which were present during the mediations where the parties unsuccessfully tried to resolve their dispute. Student's request this close to trial was opposed by Districts and, if added by way of a fourth amendment, would delay the resolution of two disputed IEPs to the prejudice of all parties.

Accordingly, for the reasons discussed above, Student's request to add an issue is denied and the issues for hearing shall be as follows:

B. Issues.

In Student's case: [1]

1) Did Districts deny Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) in his May 12, 2011 individualized education program (IEP) by failing to:

a) offer appropriate goals that addressed his unique needs arising from hearing loss;

b) consider, in determining its offer, the related services and program options available to Student in his primary mode of communication, American Sign Language (ASL), that provided Student with an equal opportunity for communication access; and

c) offer an appropriate placement.

2) Did Districts deny Student a FAPE in the LRE in his May 11, 2012 IEP by failing to:

a) assess Student in the areas of communication and language related to his hearing loss;

b) offer appropriate goals that addressed his unique needs arising from hearing loss;

c) consider, in determining its offer, the related services and program options available to Student in his primary mode of communication, American Sign Language (ASL), that provided Student with an equal opportunity for communication access; and

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[1] Student acknowledged that Student's Problem 3 in the Third Amended Complaint, which alleges violations Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 701 et. seq. and the American with Disabilities Act, was dismissed by OAH in connection with Student's original complaint in this matter on the grounds that OAH has no jurisdiction over those issues. Student withdrew the issue from consideration at hearing based on OAH's lack of jurisdiction. Accordingly it will not be an issue for hearing.

d) offer an appropriate placement.

Student's proposed resolutions include an order by OAH compelling Districts to refer Student to CSD, compensatory education, and unspecified assessments.

In Districts' case, the sole issue is:

Did Districts offer Student a FAPE in Student's May 11, 2012 IEP such that they may implement the IEP in its totality without parents' written consent?

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" (for Student), "D" (for CVUSD) and "BP" (for BPUSD) in front of the exhibit to designate if it is a Student, CVUSD or BPUSD exhibit. Districts may consolidate their exhibits into one notebook for the purpose of convenience of the witnesses.

Student's attorney and Districts' attorneys shall meet and confer telephonically or in person not later than close of business on March 7, 2013 regarding exhibits, and shall make reasonable efforts to eliminate all duplicate exhibits. To the extent any party intends to present a witness whose professional credentials will be offered, that party shall include in its witness notebook a current resume or curriculum vitae for the witness. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall provide copies of the resumes to opposing counsel not later than one business day before the witness is scheduled to testify.

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 identifying the date and title of the document, and page number location. At the hearing, the parties shall supply an exhibit binder containing exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties shall not serve exhibits on OAH prior to the hearing.

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. No 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 shall meet and confer regarding witness schedules not later than close of business on March 7, 2013. Where more than one party has designated the same witness, that witness shall only be called to testify one time, except for rebuttal purposes if ordered by the ALJ, and all parties shall examine that witness at that appearance.

The witness schedule shall be presented to the ALJ on the first day of hearing, and shall incorporate an estimate of time by each party for direct and cross examination. 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 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. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

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 has requested permission for witness Nancy Sager to testify by telephone, estimating her testimony on direct examination will take approximately 30 minutes. Student's motion to allow Nancy Sager to testify telephonically is granted. Ms. Sager's telephonic testimony shall be limited to one hour, unless otherwise ordered by the hearing officer. Student shall provide Ms. Sager 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.

7. Order of Presentation of Evidence. This matter is consolidated, and involves three parties. Student's Issue 2 and the two respondent districts' sole issue overlap. Therefore, the order of presentation of evidence shall be as follows. Student shall present his case first. The two districts shall follow Student's direct examination of each witness and shall conduct cross examination and, to the extent the witness is designated in their case, direct examination of the witness. Student shall have the opportunity to conduct cross-examination and re-direct upon completion of the two districts' cross/direct.

8. Motions. Student requested in his PHC statement that BPUSD's and CVUSD's joint due process complaint be dismissed on the grounds that it is moot. Student's request is deemed a motion to dismiss. It was not supported by any authenticated evidence. BPUSD and CVUSD opposed the motion during the hearing.

Under the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et. seq.), a party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].)

Although OAH will grant motions to dismiss allegations that are facially outside of OAH jurisdiction (e.g., civil rights claims, section 504 claims, enforcement of settlement agreements, incorrect parties, etc…..), special education law does not provide for a summary judgment procedure. Student's motion seeks summary judgment of Districts' entire case, which is more appropriately decided by the hearing judge after the parties have the opportunity to develop an evidentiary record. According, Student's motion to dismiss is denied.

At present no other prehearing motions are pending or contemplated. Any prehearing 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 the prehearing conference of March 4, 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 or set to vibrate 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. A Spanish language and an ASL interpreter are required. Regarding the ASL interpreter, Student's counsel notify OAH immediately but not later than March 7, 2013, as to on what specific date or dates the ASL interpreter will be required. CVUSD's counsel shall notify OAH not later than three business days prior to the date on which the Spanish language interpreter is required.

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

14. Settlement. The parties are encouraged to continue working together 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. In addition, 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. THE PARTIES SHOULD 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. 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 an agreement is reached subject to board approval, the parties shall timely notify OAH in writing, as described above, and shall include the date of the next scheduled board meeting, and request a status conference.

The assigned ALJ will check for messages the evening prior to the hearing or 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: March 6, 2013

/s/

ADRIENNE L. KRIKORIAN
Administrative Law Judge
Office of Administrative Hearings