

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2012090554

v.

FREMONT UNIFIED SCHOOL DISTRICT,

FREMONT UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2012120305

v.

ORDER FOLLOWING PREHEARING
CONFERENCE

PARENTS ON BEHALF OF STUDENT.

On January 14, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Brett Allen, Attorney at Law, appeared on behalf of Student. Deborah Ungar Ettinger, Attorney at Law, appeared on behalf of Fremont Unified School District (District). 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 January 22 – 25, 2012. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for January 22, 2012, when the hearing shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place at the District's offices, located at 4210 Technology Drive, Fremont, California 94538.¹

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 At a minimum for the hearing, 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 the District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. The District shall ensure that all parties and the ALJ have drinking water 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.²

Student’s Issues for Hearing

Issue 1: Did the District from September 17, 2010 through the present deny Student a free appropriate public education (FAPE) by failing to assess Student in all areas of suspected disability and/or failing to adequately assess, including dyslexia, assistive technology (AT), behavior, neuropsychological, health, vision, motor abilities, language functioning, general intelligence, academic performance, communicative status, self-help skills, mobility and orientation, career and vocational abilities and interest, and social-emotional status.

Issue 2: From September 17, 2010 through the present, did the District commit procedural violations that prevented Parents from meaningfully participating in Student’s educational decision-making process, which denied Student a FAPE, by failing to:

a) Include Parents in the individualized educational program (IEP) decision-making process by predetermining the IEP offer and not considering information presented by Parents;

b) Provide prior written notice as to its refusal to assess Student in all areas of suspected disability as to dyslexia, AT, behavior and health; refuse parental requests to update Student’s IEP; and, refuse Student’s request for a non-public school placement?

Issue 3: Did the District from September 17, 2010 through the present deny Student a FAPE by failing to make an IEP offer that included:

a) Placement in a small educational facility with one-to-one tutoring and small group and individual instruction;

b) Lindamood-Bell reading and math instruction;

² Any motion to amend a Due Process Complaint, which was not made by either party in connection with this PHC, or permitted by this Order, shall comply with California Education Code section 56502, subdivision (e). If granted, the filing of an amended complaint would restart the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

c) Learning via visual assistance, and breaking down instruction into smaller components of learning;

d) AT;

e) Pull-out instruction for core academic areas; and

f) Goals, services, accommodations and placement based on the recommendations of Dr. Diane Kusters in her assessment?

Issue 4: Did the District violate Parents' procedural rights, which prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by failing to provide a timely copy of Student's educational records in response to the August 27, 2012 request?

Proposed Resolutions: Student requests payment for and placement at Bayhill, a certified non-public school, for the 2012-2013 and 2013-2014 school years, including round trip transportation and educationally required computers, software, training, and other expenses related to her attendance at Bayhill. Student also seeks reimbursement for educational expenses. Student requests an hour a week of counseling for the 2012-2013 and 2013-2014 school years, and Lindamood-Bell services for 2012-2013 school year and 2013 extended school year. Finally, Student requests, independent educational evaluations in the areas of dyslexia, AT, behavior, neuropsychological, health, vision, motor abilities, language functioning, general intelligence, academic performance, communicative status, self-help skills, mobility and orientation, career and vocational abilities and interest, and social-emotional status.

District's Issue for Hearing

Issue: Does the District's December 7, 2012 IEP provide Student with a FAPE in the least restrictive environment?

Proposed Resolution: The District requests an order that its December 7, 2012 IEP provides Student with a FAPE in the least restrictive environment.

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 "D" in front of the exhibit to designate if it is a Student or District exhibit (for example, "S-5, S-6," or "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. By 5:00 p.m. on January 15, 2013, the parties shall have served their evidence binders on each other 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 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 January 17, 2013, as to the schedule of witnesses, 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 January 18, 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 following witnesses will be called to testify by Student: Parents, Karen Russell, Julie Kelly, Sarah Smoot, Jana Holmes, Bob Moran, Natalie Mintey, Dr. Diane K. Kusters, Deborah Bloom, Beth Johnson, Rachel Dial, Annalisa Koch, Judith Cameron, Kathleen Kammerer, Mrs. Mohandas, Shelly Lobell, and Donna Austin.

The following witnesses will be called to testify by the District: Parents, Student, Judith Cameron, Rachel Dial, Jana Holmes, Beth Johnson, Julie Kelly, Annalisa Koch, Bob Moran, Karen Russell, Kristine Schmeel, Rajeshree Singh, Sarah Smoot, and Christy Hallford.

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

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 parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. 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.

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. Neither party requested telephonic testimony.

7. Order of Presentation of Evidence. This matter is consolidated. The order of presentation of evidence shall be as follows: Student and then the District. If a witness is 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. No pretrial 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 January 14, 2012.

9. 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. The recording of the hearing shall cease upon instruction of the ALJ that the matter is "off the record," and may only resume when the ALJ informs the parties that the matter is "on the record."

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

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/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.

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

14. Hearing Closed To the Public. At the request of Parents, the hearing will be closed to the public. If Parents subsequently request an open hearing, counsel for Student shall immediately notify OAH and counsel for the District.

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: January 15, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings