

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HAYWARD UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012080885

ORDER FOLLOWING PREHEARING
CONFERENCE

On January 14, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Attorney LaJoyce Porter appeared on behalf of Student and Parents (Student). Attorney James Meeker appeared on behalf of the Hayward Unified School District (District). The PHC was recorded.

Based on discussion with the parties, the following order is issued:

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on February 5 through 7, 2013, for a total of three days of hearing. In the event a fourth day of hearing is necessary, the hearing shall be continued to Friday, February 8, or Wednesday, February 13, 2013, at the discretion of the assigned Administrative Law Judge (ALJ), unless otherwise ordered. The hearing shall begin at 9:30 a.m. on February 5, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 24411 Amador Street, Hayward, California 94540.¹

2. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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 without need for a subpoena. A witness will not be regarded as unavailable for

¹ At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. The District shall ensure that all parties and the ALJ have drinking water and tissue available to them during the hearing. In addition, District has agreed to provide parking access for the ALJ and the attorney for Student.

purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable.

3. Issues: The issues for hearing are limited to those alleged in Student's request for due process (complaint). The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.²

Issue A: For the 2012-2013 school year and the 2012-2013 extended school year for the summer of 2013 (2013 ESY),³ did District procedurally deny Student a free appropriate public education (FAPE) because it:

- (1) Failed to make an offer of FAPE at the August 2, 2012 individualized education program (IEP) team meeting; and/or
- (2) Failed thereafter to schedule a continued IEP team meeting to complete the August 2, 2012 meeting and make an offer of FAPE?

Issue B: For the 2012-2013 school year and the 2013 ESY, did District substantively deny Student a FAPE because it failed to offer placement and related services to address Student's unique needs in the following areas:

- (1) Educational placement in a small therapeutic school environment;⁴
- (2) Speech and language therapy services;
- (3) Educationally related mental health services;
- (4) Writing services and/or supports;
- (5) Occupational therapy services; and
- (6) Transportation services to and from his educational placement and related services locations.

² The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

³ The parties understand that ESY involves a different legal analysis than that for the school year itself, which may be addressed during the hearing. However, for purposes of this issues statement, Student indicated that his issues for the school year and the ESY are otherwise the same.

⁴ During the PHC, Student indicated that annual goals are not at issue in this proceeding.

4. Exhibits: Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing.⁵ At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. 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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

5. Witnesses: At the commencement of the due process hearing, the ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. 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. Each party shall manage the number of witnesses so that the party's evidence will be presented within its approximate allocation of fifty percent of the total hearing time. The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

At the present time, Student and District each intend to call all witnesses listed in their respective prehearing conference statements. However, Student may call District's former Director of Special Education, Mina Hutchins, instead of Susan Parker. In addition, District may call additional witnesses and will disclose them as required by law.

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 parties did not request the telephonic testimony of any witness during the PHC but reserved the right to do so. A party seeking to present a witness by telephone shall move in advance for leave to do so with an explanation of the reasons for the request. If OAH grants the request, the party requesting the telephonic testimony shall provide the proposed witness

⁵ Education Code section 56505, subdivision (e)(7).

with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the testimony of the witness. In addition, if the request is granted, the District shall ensure that the hearing room has a speaker telephone with adjustable volume control and a long telephone cord, so that the telephone can be placed close to all parties to ensure the ability to hear and record the testimony of the witness and the witness to hear objections and rulings.

7. Order of Presentation of Evidence: Student shall produce his evidence first. Where Student and District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

8. Closed Hearing: Consistent with Student's request, the hearing shall be closed to the public.

9. Motions: 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 this PHC. District's motion for Student's legal team to disclose a physical address in California other than their designated copying service company was denied as it was not supported by either legal authority or a delivery problem.

10. Special Needs and Accommodations: No special accommodations were requested during the PHC.

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 turned off or set to vibrate 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. Any party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

13. Settlement: The parties are encouraged to continue their attempts to reach an agreement before the due process hearing. The parties expressed the desire to mediate prior to the hearing and were directed to meet and confer to agree upon a date and notify OAH as soon as possible.

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 during business hours 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. OAH will check for messages the evening prior to the hearing and the morning of the hearing.

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

Dated: January 14, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings