

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ACALANES UNION HIGH SCHOOL
DISTRICT.

OAH CASE NO. 2012100025

ORDER FOLLOWING PREHEARING
CONFERENCE; SETTING
ADDITIONAL DUE PROCESS
HEARING DATE AND DENYING
MOTION TO EXCLUDE WITNESSES

On January 23, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Adeniyi A. Ayoade, Office of Administrative Hearings (OAH). Mandy G. Leigh, Attorney at Law, appeared on behalf of Student (Student). Elizabeth J. Rho-Ng, Attorney at Law, appeared on behalf of the Acalanes Union High School District (District). The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m. with the exception of the first day of hearing, on which it shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place on **February 4 and 5, February 7 and February 11, 2013¹** at the District's offices located at **1963 Tice Valley Blvd., Walnut Creek, CA 94595.**

The District shall ensure that there is an appropriate room available for the due process hearing. The room shall meet OAH specifications, and at a minimum, 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 District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. A room with one large conference table is not suitable. If a suitable room is not available for any of the hearing days, the District shall immediately notify OAH and the parties and propose a different location. Fresh water and tissue shall be available in the hearing room at all times.

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 The parties have requested that February 8, 2013 be scheduled as a due process hearing date. Because February 8 is a Friday, that date is not calendared at this time. At the hearing, the parties may renew their request with the hearing ALJ.

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 those alleged in the due process complaint, as clarified in Student’s PHC statement and discussed by the parties and the ALJ at the PHC, as follows:²

a) **ISSUES³**

1) From the end of the 2012 extended school year (ESY) to the present time, whether District denied Student a free appropriate public education (FAPE) by failing to find Student eligible for special education and related services, either under the eligibility category of specific learning disability (SLD) or other health impairment (OHI)?

2) Does Student require placement at Fusion Academy for the 2012-2013 school year (SY) in order to receive a FAPE?

b) **PROPOSED REMEDIES.** As proposed resolutions, Student seeks an order from OAH finding him the prevailing party. Further, Student wants OAH to: 1) find that he qualifies for special education and related services under the eligibility category of specific learning disability SLD or OHI, and that he is in need of special education in order to receive a FAPE; 2) requiring District to place Student at Fusion academy; 3) directing District to reimburse Student’s parents all costs resulting from District failure to provide special education to Student; and 4) award other reasonable costs, fees and remedies as provided by law.

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

² The issues have been reframed for clarity. Any amendments to a Due Process Complaint, not permitted by this Order, shall comply with California Education Code section 56502, subdivision (e). The filing of an amended complaint will restart the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

³ Student’s complaint identifies a third issue of whether Parents are entitled to reimbursement for Student’s placement at Fusion Academy from the end of 2012 ESY through the present. This is not an issue for determination, but rather an available remedy for consideration, should Student prove that District denied him a FAPE from the end of 2012 ESY through the present. As such the issue has been removed and is covered under the requested remedies section.

exhibit (for example, 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. 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. Exhibit binders shall be exchanged five business days prior to the hearing in accordance with Education Code section 56505, subdivision (e)(7), unless the parties agree to a later date.

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 good cause is shown as to why it was not previously exchanged. The parties shall be prepared to make such an offer of proof.

The ALJ shall determine whether an exhibit is to be admitted into evidence. Only exhibits relevant to the issues previously stated in this order shall be admitted, unless used for impeachment purposes. The fact that an exhibit is placed in an exhibit binder does not guarantee its admission.

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, and at the discretion of the ALJ.

The parties are ordered to meet and confer to schedule the order of witnesses, and further ordered to provide the ALJ at the commencement of the hearing with a schedule of witnesses for that day, and a time estimate for the witness's direct and cross-examinations. 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. **Parties shall be prepared to make an offer of proof, if asked, as to why a specific witness's testimony is necessary.**

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. In the case of witnesses who have professional licenses and credentials, it is strongly recommended (but not ordered) that the party calling such witnesses be prepared to present copies of their *curriculum vita* (CV) or resume as exhibits, and exchange them with the other party.

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. 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.

While Student indicated that his witness from the California Department of Education (CDE) may prefer to testify by telephone, Student failed to make a specific request that any witness be allowed to testify telephonically. Further, no ground for such request was made known during the PHC. Therefore, if intended by Student, Student should specifically submit his request for telephonic testimony, stating which witness intends to testify telephonically, and the ground for such request.

7. Motions. Other than as discussed below, no other 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 23, 2013.

- i. Order Denying Parties' Requests to Exclude Witnesses: Both parties requested that certain witnesses be excluded from the hearing. Both parties made arguments based on relevancy, and both are unpersuasive in their arguments. Thus, and more specifically, District's motion to exclude the testimonies of Amanda Renno and relevant CDE staff is denied. Student's motion to exclude the testimonies of Student and Dr. Jacqueline Cheong is also denied. Each party may renew their objections to calling any particular witness at the hearing. Further, each party must be prepared to make an offer of proof, if asked, as to why a specific witness' testimony is necessary. Otherwise, the motions to exclude are herein denied without prejudice.

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

9. 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.

10. 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.

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

12. Hearing Opened To the Public. At the request of the Student, the hearing shall be opened to the public.

13. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. If the parties believe a mediator may assist them in settlement negotiations, they should submit a request for mediation 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. 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. ON MARCH 16, 2012, 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. The assigned ALJ will check for messages the evening prior to the hearing and the morning of the hearing.

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

IT IS SO ORDERED.

Dated: January 24, 2013

/s/
ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings