

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

OAKLAND UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012101108

ORDER FOLLOWING PREHEARING
CONFERENCE

On January 23, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH). Attorneys Suge Lee and Maggie Roberts appeared on behalf of Student. Attorney Lenore Silverman appeared on behalf of Oakland Unified School District. She was accompanied by John Rusk, District representative. 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 take place on February 5-7 and 12-14, 2013, and continue day to day, Monday through Thursday as needed, at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m. with the exception of February 5 and 12, 2013, on which days the hearing shall begin at 9:30 a.m., unless otherwise ordered.

The hearing shall take place at OAH, located at 1515 Clay Street, Suite 206, Oakland, California 94612. 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. The issues at the due process hearing are listed below:¹

- a) Did the District commit procedural violations during the 2010-2011 school year (SY), which significantly impeded Parent’s opportunity to participate in the individualized education program (IEP) process, denied Student a free

¹ The issues have been slightly reordered and reworded from the PHC.

appropriate public education (FAPE), and/or deprived him of educational benefit by:

- 1) Failing to meet its child find obligations; and
 - 2) Failing to conduct a timely assessment of Student following receipt of consent from Parent?²
- b) Did the District commit procedural and/or substantive violations for the 2011-2012 SY that denied Student a FAPE by:
- 1) Failing to conduct a timely assessment of Student;
 - 2) Failing to assess Student in all areas of suspected disability;
 - 3) Failing to develop appropriate educational goals for Student;
 - 4) Failing to offer Student appropriate behavioral support;
 - 5) Failing to offer Student mental health counseling;
 - 6) Failing to develop a transition plan for Student and to offer him transition services;
 - 7) Failing to timely inform Parent of Student's progress on his goals;
 - 8) Failing to implement Student's IEP developed in November 2011;
 - 9) Failing to provide Student with specialized instruction called for in his IEP following his suspension from school in January 2012;
 - 10) Failing to conduct a functional analysis assessment (FAA) and provide Student with an appropriate behavior intervention plan (BIP);
 - 11) Failing to provide Parent with notice of a manifestation determination meeting that was held on April 20, 2012; and
 - 12) Failing to follow the timelines for a mental health assessment following receipt of Parent's consent?

² Student's complaint was filed with OAH on October 26, 2012. The parties agreed Student's claims for the 2010-2011 SY shall accrue after October 26, 2010, due to the two year statute of limitations pursuant to Education Code, section 56505, subdivision (l).

- c) Did the District commit procedural and/or substantive violations For the 2012-2013 SY that denied Student a FAPE by:
- 1) Failing to have an IEP in place for the beginning of the 2012-2013 SY;
 - 2) Changing Student's placement without an IEP team meeting on August 29, 2012;
 - 3) Failing to complete a mental health assessment in a timely manner in September 2012;
 - 4) Failing to conduct an FAA and provide Student with an appropriate BIP;
 - 5) Denying Parent and the IEP team members meaningful input in developing a placement and services plan in response to the mental health assessment, and failing to provide Parent with information concerning Student's progress in meeting his goals;
 - 6) Failing to include appropriate goals in the IEP;
 - 7) Failing to include an appropriate behavior plan in the IEP;
 - 8) Failing to offer Student placement in the least restrictive environment; and
 - 9) Failing to include a transition plan in the IEP?

Student's proposed resolutions are:³

³ During the PHC the ALJ suggested using the proposed resolutions contained in the District's PHC statement, which were drawn from the due process complaint. A complaint is required to include proposed resolutions to the problem, to the extent known and available to the party at the time. (20 U.S.C. §1415(b)(7)(A)(ii)(IV).) The District objected to the addition of an inclusion specialist as part of the list of proposed resolutions at the PHC. However, because a student's circumstances may change during the period following the filing of a due process complaint, it is not at all unusual for proposed resolutions to change during this interim period of time. Following the PHC the ALJ reviewed the proposed resolutions contained in Student's PHC statement and determined that these were most likely to pertain to Student's current situation, which must be considered by the ALJ any time an award of compensatory education, or order for placement and services is made.

- a) Placement in a general education environment with resource support on a pull-out basis for five hours each week, and resource support on a push-in basis for five hours per week;
- b) An inclusion assessment by an independent inclusion specialist who will provide recommendations for a full-inclusion plan including modified curriculum and behavioral and instructional supports. The inclusion specialist will meet with the IEP team and assist in developing or revising Student's IEP, and will provide 25 hours of consultation to Student's Core team as necessary;
- c) Provision of an FAA by an independent behaviorist and 25 hours of behavior intervention;
- d) District funding of an independent neuropsychological evaluation to assess Student's cognitive abilities and adaptive skills. The neuropsychologist shall meet with the IEP team to discuss the assessment and recommendations;
- e) Three hours each week of mentoring services to provide Student with emotional support, social skills and coping skills training. The mentor shall be included as a member of the IEP team.
- f) Referral to an independent transition specialist;
- g) Parent counseling to facilitate and support Parent in implementing Student's behavior plan, and addressing his mental health and social skills needs;
- h) An IEP team meeting to be convened within 30 days after the issuance of the Decision in this matter to determine IEP goals to address Student's needs in the areas of academics, transition, mental health and behavior;
- i) Compensatory education to include 70 additional hours of mentoring services, 250 hours of individualized instruction in reading and math by a licensed educational therapist of Parent's choice, two weeks of summer or day camp or 100 hours of social or community activity, such as a structured afterschool program to be jointly determined by the District and Parent;
- j) Payment of transportation costs incurred to and from the location of compensatory services; and
- k) Right of return to a previous placement if Student is placed in a juvenile court school for less than ten school days, absent court prohibition or Student relocation outside the boundaries of the District.

The ALJ and parties shall review the issues and proposed resolutions prior to the commencement of the due process hearing, and may make further changes then.

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”). Exhibits shall be separated from one another by tabbed and consecutively numbered dividers. 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. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), i.e., five business days prior to the commencement of the due process hearing. 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.

The parties shall be prepared to make an offer of proof during the hearing to support a request to admit an exhibit should the ALJ require one. Exhibits shall be admitted only by order of the ALJ. The inclusion of an exhibit in an evidence binder does not guarantee that it will be admitted. Only exhibits that are relevant to the issues will be admitted.

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 explaining why it was not previously exchanged or included in an exhibit list, and unless 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 PHC statement or during the PHC, 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 close of business on January 29, 2013, as to the schedule of witnesses. The parties will 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.

The following witnesses will be called to testify by Student: Mother, Aubrey Clifton, Jermaine Ashley, Jeanne Rodriguez, Javerte Bobino, Ruth Rubacalva, Dennis Nelson, Matt Clarke, and a social worker at Oakland High School with the Temporary Alternative Placement program (whose name was unknown to Student’s attorneys at the time of the PHC, but whose identity shall be disclosed to District’s counsel as soon as it is determined).

The following witnesses will be called to testify by the District: Debra Lyman, Javerte Bobino, Jennifer Lacy, Ruth Rubacalva, Dennis Nelson, Michael Knox, Christina Macalino, Tim Broderick, Kim Henderick, Dora Bobson, Fred Trodler, Matt Clarke, Leonard Hooper, Sheilagh Andajur, Troy Johnstone, Lawanne Ross and Pamela Mills.

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 must be prepared to make an offer of proof as to what a witness will testify and why the testimony is sufficiently probative and relevant should the other party object to a proposed witness testifying.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for the direct and 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 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. The ALJ 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.

The ALJ granted Student's request that Aubrey Clifton testify telephonically since he now resides in another state. Student shall ensure he has evidence binders from both parties prior to him testifying.

7. Order of Presentation of Evidence. Student shall present his case first. However, during its initial cross-examination the District shall be permitted to question witnesses it also intends to call on matters it would cover in direct examination if Student was not also calling the person as a witness. This will result in a witness only being required to appear 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 23, 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 during the hearing unless permission to the contrary is obtained from the ALJ.

Neither party made a request to record the hearing. Should a party wish to do so, a request must be made to the ALJ presiding over the hearing. If the request is granted, the parties are reminded that the OAH recording is the official recording of the proceedings. Recording equipment must be quiet and unobtrusive, and must be shut off any time the ALJ takes the matter "off the record." Failure to abide by these instructions can result in a revocation of permission to record, and an order to destroy earlier recordings of the proceedings.

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. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

13. Hearing Closed To the Public. At the request of the parent, 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 LAST BUSINESS 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. 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: January 25, 2013

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings