

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MILPITAS UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012100059

ORDER FOLLOWING PREHEARING
CONFERENCE AND LEAVE TO FILE
AN AMENDED COMPLAINT

On January 16, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Carolyn Nedley, Attorney at Law, appeared on behalf of Student. Ernest Bell, Attorney at Law, appeared on behalf of the Milpitas 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 February 5 – 8, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for February 5, 2013, when the hearing shall begin at 9:30 p.m., unless otherwise ordered. The hearing shall take place at the District's offices, located at 1331 East Calaveras Boulevard, Milpitas, California 95035.¹

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. 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. Motion For Leave to Amend: During the prehearing conference, Student indicated that he may make a motion to amend the complaint to include allegations that

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 and tissue available to them.

occurred after the filing of the complaint. The District did not oppose Student filing an amended complaint.

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C. § 1415(c)(2)(E)(i)(II).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. § 1415(f)(1)(B).) The Individuals with Disabilities Education Act (IDEA) does not set forth a specific motion practice process. (20 U.S.C. § 1415.) The IDEA sets forth when a party may amend its complaint, but does not require a specific motion to amend. (20 U.S.C. § 1415(c)(2)(E)(i).)

Based on the foregoing, Student's motion to amend the complaint is granted as it was timely, and not opposed by the District. Student may file a second amended complaint by 5:00 PM on Friday, January 25, 2013. If Student files his second amended complaint, all dates set forth in Paragraph 1 will be vacated and OAH shall issue a new Scheduling Order will issue.²

If Student fails to file his second amended complaint by 5:00 PM on Friday, January 25, 2013, the matter will proceed to due process hearing as set forth in Paragraph 1 on February 5, 2013.

3. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.

Issue 1: Did the District 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:

a) From March 18, 2011, through the present, as to mental health, and social-emotional deficits;³ and

² Any motion to amend a Due Process Complaint, which was not made by Student 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).)

³ On October 8, 2010, former Governor Schwarzenegger vetoed funding for mental health services, including conducting assessments, then provided by county mental health agencies, and the obligation reverted to local education agencies. (*California School Boards Association v. Brown* (2011) 192 Cal.App.4th 1507, p. 1519.) Subsequently, on June 30, 2011, Governor Brown signed into law a budget bill (SB 87) and a trailer bill affecting educational funding (AB 114). Accordingly, the statutory responsibilities to assess and

- b) From March 18, 2011, through March 8, 2012, as autistic-like behaviors?

Issue 2: Did the District commit a procedural violation that prevented Parent from meaningfully participating in Student's educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to provide an assessment plan within 15 days after Parent's October 15, 2011 assessment request?

Issue 3: From March 18, 2011 through the present, did the District commit procedural violations that prevented Parent from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by failing to provide prior written notice as to its refusal to change Student's primary special education eligibility to autistic-like behaviors; assess Student pursuant Parent's October 15, 2011 request; and, change Student's placement to a non-public school placement?

Issue 4: Did the District from March 18, 2011 through the present deny Student a FAPE by failing to make an IEP offer that:

- a) Included goals, accommodations, services and placement to address his autistic-like behaviors;
- b) Contained adequate goals and services to address his pragmatic language deficits;
- c) Addressed issues caused by Student being bullied by other students due to deficits related to his autistic-like behaviors;
- d) Addressed his mental health and social skills deficits;
- e) Allowed him to participate in after school sports and social functions; and
- f) Included the provision of a one-to-one aide to assist Student in social situations?

Issue 5: 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 May 14, 2012 request?

provide related mental health services to special education pupils has been transferred to local education agencies instead. (See Gov. Code § 7573.)

Proposed Resolutions: Student requests placement in a certified non-public school that can meet his unique needs. Additionally, Student seeks two-hours a week of individual speech and language therapy, including during the summer. Student asks that the District fund an independent neuropsychological, psychoeducational and mental health assessments. The District shall also provide Student with an after school social skills program designed for children with autism. As compensatory education, Student requests one-to-one academic instruction, speech and language services and social skills training, to be provided by a certified non-public agency. Finally, the District shall reimburse Parent for any educational expenses caused by the District's denial of a FAPE.

4. 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 29, 2013, the parties shall have served their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7).⁴ 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.

5. 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 February 1, 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 February 4, 2013, each party shall serve on the other party, and on the ALJ, the final witness list, including the

⁴ In the alternative, the parties may exchange documents by electronic transmission and provide the other party the exhibit binder at hearing. The date for exchanging exhibits will change if Student files an amended complaint in a timely manner.

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.⁵ 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 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 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: Mother, Student, Houn Nguyen, Trisha Lee, Latisha Roberts, Laura Foegal, Luis Lopez, Ron Kopplinger, Joshua Telles, Kathleen Jenny-Spencer, Julie Jang, Matthew Patterson, and Amy Sanidad.

The following witnesses will be called to testify by the District: Parents, Laura Foegal, Luis Lopez, Ron Kopplinger, Joshua Telles, Kathleen Jenny-Spencer, Julie Jang, Matthew Patterson, and Amy Sanidad.

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.

6. 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.

7. 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.

8. Order of Presentation of Evidence. 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

⁵ Parties shall not mail a hard copy of any document to OAH that has already been filed by facsimile transmission.

party, the parties shall conduct direct and cross-examination so that the witness need only testify once.

9. 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 16, 2012.

10. 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."

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

12. 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.

13. 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.

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

15. Hearing Open To the Public. At the request of Parent, the hearing will be open to the public.

16. 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.

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

IT IS SO ORDERED.

Dated: January 17, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings