

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

DEL MAR UNION SCHOOL DISTRICT.

OAH CASE NO. 2012110472

ORDER FOLLOWING PRE-HEARING
CONFERENCE OF FEBRUARY 11,
2013; ORDER CONTINUING DUE
PROCESS HEARING

Administrative Law Judge (ALJ) Darrell Lepkowsky of the Office of Administrative Hearings (OAH) convened a prehearing conference (PHC) in this matter on February 11, 2013. Mark Woodsmall, Attorney at Law, appeared on behalf of Student. Sundee Johnson, Attorney at Law, appeared on behalf of the Del Mar Union School District (District). The ALJ recorded the PHC.

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

1. Hearing Dates, Times, and Location. Based upon good cause shown, the hearing is continued on District's motion. The hearing shall now take place starting on **March 25 through 28, 2013, and continuing day to day thereafter as ordered by the ALJ**, at the District's offices located at 11232 El Camino Real, Del Mar, CA 92130. The hearing shall start at 1:30 p.m. on March 25, and at 9:00 a.m. all other days, unless otherwise ordered.

The District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum 1) a table for Parent and Student's legal representative; 2) a table for the District's legal representative and the District's representative; 3) a table for the witness; and 4) a table for the ALJ, near an electrical outlet. The District shall provide drinking water to all parties, witnesses and the ALJ. The water does not have to be bottled. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night.

The District shall also ensure that a separate and private room is available near the hearing room, for Student and his representatives during recess and breaks.

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, as clarified with the parties at the PHC:

a) Was the District's offer of educational placement during the August 24, 2012 individualized educational program (IEP) meeting reasonably calculated to provide Student with a free appropriate public education (FAPE)?

b) Was the District's proposed interim placement for the 2012-2013 school year deficient because it does not provide Student with research-based intervention?

c) Did the District materially fail to implement Student's previous IEP by:

i. Providing Student with 50 minutes per week of speech and language services during the school day rather than outside of regular school hours?

ii. Failing to provide 60 minutes a week of behavior intervention consultation through a non-public agency?

iii. Failing to provide 300 minutes a month of speech and language consultation with staff?

iv. Failing to provide Student with 120 minutes a week of occupational therapy through a non-public agency outside of regular school hours?

v. Failing to provide 30 minutes per month of occupational therapy consultation through a non-public agency with District staff?

vi. Failing to provide Student with a dedicated, one-on-one aide for 360 minutes a day?

d) Did the District commit procedural violations of the Individuals with Disabilities Education Act by:

i. Predetermining its offer of placement and services to Student?

ii. Failing to consider the findings of Parents' private expert?

iii. Failing to convene an IEP team meeting to discuss the District's request for additional assessment data?

iv. Failing to provide prior written notice of the District's decisions regarding the provision of related services to Student?

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. The parties shall serve 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 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, and at the discretion of the ALJ.

The parties are ordered to meet and confer by close of business on March 20, 2013, as to the schedule of witnesses. The parties shall prepare a witness list for the ALJ to be presented at the beginning of the first day of hearing, indicating the date and time the witness will testify.

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.

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. If a witness is to be called by more than one party, each party shall ask their questions of the witness so that the witness does not need to return for testimony. Only one round of re-direct and re-cross examination shall be permitted, unless otherwise ordered.

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.

Student has indicated that he may move to present the testimony of Drs. Carrie and Joseph Dilley and Dr. Susan Spitzer by telephone due to their location over 100 miles from the hearing site. Any motion for telephonic testimony must be filed with OAH no later than March 4, 2013. Any opposition to such a motion shall be filed within three days of the receipt of the motion by the opposing party.

7. Motions. Other than the possible motion for telephonic testimony referenced above, neither party has any pending or contemplated pretrial 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 the prehearing conference of February 11, 2013.

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

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 or set to vibrate 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 translation services.

12. Hearing Closed To the Public. At the parents' request, the hearing shall be closed to the public.

13. 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 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.

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

IT IS SO ORDERED.

Dated: February 11, 2013

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings