

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012120297

ORDER FOLLOWING PREHEARING
CONFERENCE, GRANTING MOTION
TO AMEND COMPLAINT,
SHORTENING TIME FOR
CONTINUANCE MOTION, AND
CLARIFYING ISSUES TO DATE

On February 6, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH).¹ Attorney Brian A. Gonsalves appeared on behalf of Student and Parent (Student). Attorney Cathy S. Holmes appeared on behalf of the Elk Grove Unified School District (District). The PHC was recorded.

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

1. Motion to Amend: During the PHC, Student's issues were discussed and clarified, as set out below. It became apparent that Student's second issue in his request for a due process hearing (complaint), based on District's claimed denials of his right to a free appropriate public education (FAPE) from December 2010 through December 2012, did not set forth all problems intended by him. During the PHC, Student moved to amend his complaint. District opposed the motion. District did not make a sufficient showing that providing extra time for it to file a written opposition would enhance its opposition.

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 days prior to the due process hearing. (20 U.S.C. § 1415(c)(2)(E)(i); Ed. Code § 56502, subd. (e).) The filing of an amended complaint restarts the applicable timelines for the due process hearing unless the parties waive application of that requirement. (20 U.S.C. § 1415(c)(2)(E)(ii).)

In this case, Student's motion is made more than five days prior to the commencement of the hearing on Tuesday, February 19, 2013, and is therefore timely. The

¹ Administrative Law Judge Margaret Broussard observed the PHC with the ALJ.

ALJ found Student's second issue to involve: (a) a procedural issue whether District failed to properly "consider" assessment information between December 7, 2010 and July 2011; and (b) procedural and substantive issues whether, following an assessment in July 2011, District failed to both consider the new assessment information and offer and implement specified recommendations from it. However, Student was persuasive that he intended to claim denials of substantive FAPE for the period between December 7, 2010 and the July 2011 assessment that were not specified in his complaint. Student's request to amend to add those issues is reasonable and in the best interests of justice and judicial efficiency.² The proposed amendments relate to the same time frame as his other issues, which should not be heard piecemeal in separate hearings with overlapping witnesses unless necessary. District's objection that it has incurred costs in preparing for hearing to date is overruled. Accordingly, Student's motion is granted as ordered below.

Order: Student may file and serve an amended complaint by close of business on Thursday, February 7, 2013.³ Upon the filing of Student's amended complaint, all applicable timelines shall recommence, and OAH shall issue a scheduling order with new mediation, PHC, and due process hearing dates. In the event Student does not timely file his amended complaint, the hearing shall proceed as scheduled on the issues delineated below.

2. Hearing Dates, Times, and Location: In the event timelines do not start over as ordered above, the hearing dates are confirmed. The hearing shall take place on February 19 through 21, 2013, and from day to day thereafter from Monday through Thursday at the discretion of the assigned ALJ. Unless otherwise ordered, the hearing shall begin at 1:30 p.m. on February 19, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 9510 Elk Grove Florin Road, Elk Grove, California 95624.⁴

3. Motion for Continuance: During the PHC, Student's counsel indicated that Student and his family are unavailable on the above hearing dates as they will be out of town. District objected and requested time to respond. Student was ordered to file and serve a

² This ruling does not limit Student's right to file an amended complaint to add other issues. However, Student shall file a cover letter with the amended complaint providing notice to the District and OAH of the amendments. In addition, District retains the right to file any appropriate motions pertinent to the amended pleading.

³ Student assured the ALJ and the District that he does not need more time to file the amended complaint.

⁴ 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.

request for a continuance specifying factual details to address the question of good cause to support a continuance. Both parties agreed to orders shortening time.

Order: Student may file a written request for a continuance by close of business on February 7, 2013. District shall file a response by close of business on Thursday, February 8, 2013. (These dates are extended one day for each party from those discussed during the PHC in order to accommodate Student's motion to amend, which occurred later in the PHC.) In the event Student instead files an amended complaint, this motion will be rendered moot.

4. 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. A witness will not be regarded as unavailable for 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.

5. Issues: The issues for hearing are limited to those alleged in Student's complaint.⁵ The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.

Issue A: Did District deny Student a FAPE by failing to assess and/or failing to properly assess Student in the following areas related to his suspected disabilities:

(1) A neuropsychological and/or additional psychoeducational assessment from December 7, 2010,⁶ to the time of Student's July 2011 private neuropsychological assessment, in the areas of:

- (a) Auditory problems and auditory processing;
- (b) Verbalizing problems and verbal processing;
- (c) Weak background of academic knowledge; and

(2) An assistive technology assessment after Student's private July 2011 neuropsychological assessment?

⁵ 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).)

⁶ During the PHC Student agreed that the applicable two-year statute of limitations ran on December 7, 2010, two years prior to the filing of his complaint on December 7, 2012, and not in November 2010 as claimed in his complaint.

Issue B: Did District fail to offer and/or provide Student a FAPE as to his educational program and related services because:

(1) District, in its individualized education program (IEP) in effect as of December 7, 2010, failed to properly consider Dr. Chitnis' diagnosis of attention deficit disorder (ADD) and all processing problems identified in District's April 2010 psychological report;

(2) District, in its IEP's after Student's July 2011 neuropsychological assessment failed to properly consider all information and diagnoses contained in that evaluation; and

(3) District's IEP's after Student's July 2011 neuropsychological assessment failed to offer and implement the strategies and accommodations described in the assessment report?

6. Exhibits: Exhibits shall be pre-marked by each party and placed in a three-ring exhibit binder 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.⁷

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.

7. Witnesses: Neither party may be permitted to call any witnesses not disclosed under Education Code section 56505, subdivision (e)(7), except for good cause shown, supported by declaration under penalty of perjury, and at the discretion of the ALJ.

⁷ Education Code section 56505, subdivision (e)(7). The law also provides that the ALJ has discretion to exclude testimony of witnesses or admission of documents that were not disclosed by the parties. (Ed. Code sections 56505, subd. (e)(8), and 56505.1, subd. (f).)

Prior to the due process hearing, the parties shall meet and confer informally to discuss their witnesses and arrange a witness schedule. At the commencement of the 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, cumulative, 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.

8. 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).) During the PHC, witnesses were not discussed and neither party requested the telephonic testimony of a witness.

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 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.

9. 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.

10. Closed Hearing: The hearing shall be closed to the public in the absence of a request from Student otherwise.

11. Motions: Any other 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.

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

13. 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.

14. 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.

15. Settlement: The parties are encouraged to negotiate to reach a settlement 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 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.

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

Dated: February 7, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings