

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

RIVERSIDE UNIFIED SCHOOL
DISTRICT, RIVERSIDE COUNTY
OFFICE OF EDUCATION,
SACRAMENTO CITY UNIFIED SCHOOL
DISTRICT, AND SACRAMENTO
COUNTY OFFICE OF EDUCATION.

OAH CASE NO. 2013010137

ORDER FOLLOWING PREHEARING
CONFERENCE; ORDER
BIFURCATING THE HEARING;
ORDER CONTINUING THE
HEARINGS

On February 20, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Daniel Shaw, Attorney at Law, appeared on behalf of Student. Jack B. Clarke, Jr., Attorney at Law, appeared on behalf of Riverside Unified School District (RUSD) and Riverside County Office of Education (RCOE). Daniel A. Osher, Attorney at Law, appeared on behalf of Sacramento City Unified School District (SCUSD). Michael Tucker, Attorney at Law, appeared on behalf of Sacramento County Office of Education (SCOE). The PHC was recorded.

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

1. Motion to Bifurcate. On February 20, 2013, RUSD and RCOE filed a motion to bifurcate issues for hearing that concerned RUSD and RCOE from those issues that involved SCUSD and SCOE for judicial economy because the two matters involved different witnesses and factual issues to be decided. Student opposed the motion to bifurcate at the PHC and SCUSD and SCOE did not oppose the request.

Federal and state law pertaining to special education due process administrative proceedings do not contain specific references to the procedure for bifurcating issues at trial. Such authority resides in the discretion of the administrative law judge, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

RUSD and RCOE established good cause to bifurcate issues for hearing that involve RUSD and RCOE from those issues that pertain to SCUSD and SCOE for judicial economy as these matters involve distinct periods of time, evidence, witnesses and relief if Student

prevails. Accordingly, Student's complaint is bifurcated, and shall proceed first as to the issues for hearing between Student and SCUSD and SCOE and then between Student and RUSD and RCOE.

2. Hearing Dates, Times, and Location. This matter is presently set for hearing on February 28, 2013, and continuing from day to day, as to all parties. At the PHC, after ALJ Castillo granted RUSD's and RCOE's motion to bifurcate, the parties discussed scheduling to ensure continuous days of hearing and to permit the timely issuance of the decision in the matter between Student and SCUSD and SCOE. The parties agreed to the hearing schedule proposed by ALJ Castillo. A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) Good cause for a continuance exists to avoid non-continuous days of hearing and for a timely decision to be made as to Student's placement.

Therefore, the due process hearing is continued as to the matter between Student and SCUSD and SCOE. The due process hearing shall take place on March 4 – 7, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for March 4, 2013, when the hearing shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place at SCUSD's offices, located at 5735 47th Avenue, Sacramento, California, 95824.

The PHC and due process hearing is continued as to the matter between Student and RUSD and RCOE. The PHC is scheduled for 1:30 p.m., on April 3, 2013.¹ The due process hearing shall take place on April 15 – 18, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for April 15, 2013, when the hearing shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place at RUSD's offices, located at 3380 14th Street, Riverside, California, 92501.²

The 45-day time line to render a written decision as to each bifurcated matter shall be based upon the continued date as to each bifurcated matter. Any further continuances shall be specific as to each bifurcated matter.

¹ Student, RUSD and RCOE need not file any amended PHC statements. If a party wishes to submit an amended PHC statement, any amendment is due to OAH and opposing parties by 5:00 p.m. on March 29, 2013.

² At a minimum for the hearing in both matters, 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 school districts' and county offices of education representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. SCUSD and RUSD shall ensure that all parties and the ALJ have drinking water and tissue available to them.

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.

Issue 1: During the 2012-2013 school year (SY), did SCUSD and SCOE deny Student a free appropriate public education (FAPE) by failing to:

- a) Offer Student an educational placement that met his unique needs;
- b) Offer Student adequate mental health services;
- c) Develop a positive behavior support plan;
- d) Provide adequate, measurable goals in all areas of need; and
- e) Develop an adequate transition plan?

Issue 2: Did SCOE violate Parent’s and Student’s procedural rights, which prevented Parents from meaningfully participating in Student’s educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to:

- a) Hold a timely individual educational program (IEP) meeting;
- b) Make a clear offer of extended school year services;
- c) Provide an assessment plan within 15 days of parent request; and
- d) Provide Parent with a copy of the December 14, 2012 IEP?

Issue 3: Did SCUSD violate Parent’s and Student’s procedural rights, which prevented Parents from meaningfully participating in Student’s educational decision-making process and denied Student an educational benefit, which denied Student a FAPE, by failing to:

- a) Attend Student’s IEP team meeting; and
- b) Make an offer of FAPE;

Proposed Resolutions: Student requests that SCUSD and SCOE provide him with compensatory education in the form individualized tutoring, behavioral services, social skills training, mental health services, and an intensive reading program, like Lindamood Bell.

Additionally, SCUSD and SCOE shall convene an IEP team meeting and offer Student a residential placement in a certified facility, such as Devereaux-Texas.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. SCUSD and SCOE shall prepare a joint evidence binder. 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 SCUSD/SCOE exhibit (for example, “S-5, S-6”, “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. In compliance with Education Code section 56505, subdivision (e)(7), the parties shall exchange exhibits by 5:00 p.m., on February 25, 2013. 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.

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, 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 27, 2013, as to the schedule of witnesses, when a party expects a witness to testify, 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 March 1, 2013, each party shall serve on the other party and on the ALJ, the final witness list, including the 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.³ 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses’ testimony.

³ Parties shall not mail a hard copy of any document to OAH that has already been filed by facsimile transmission.

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.

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's motion to allow witnesses from Devereaux-Texas to testify telephonically is granted. Student shall provide the Devereaux-Texas witness with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing. SCUSD shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student, SCOE and then SCUSD. If a witness is to be called by more than one party, the parties shall conduct direct and cross-examination so that the witness need only testify once.

8. Motions. During the PHC, SCUSD inquired as to the status of its pending motion to dismiss. ALJ Castillo informed the parties that while not served, the final order from OAH was to deny SCUSD's motion as a triable issue for hearing existed as to educational responsibility for Parent's pending residential placement request. SCUSD made a motion on the record for reconsideration. After oral argument by SCUSD, SCOE and Student, ALJ Castillo denied SCUSD's motion for reconsideration.

Any subsequent 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 PHC of February 20, 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.

11. Compensatory Education. 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. A Spanish language interpreter is required for Student's father.

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

13. Hearing Closed To the Public. Presently, Parent requests that the hearing be closed to the public. If parent requests that the hearing be opened to the public, Student shall notify OAH and the opposing parties as soon as possible.

14. 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.

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

IT IS SO ORDERED.

Dated: February 21, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings