

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

CHINO VALLEY UNIFIED SCHOOL
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2013010904

PARENTS ON BEHALF OF STUDENT,

v.

CHINO VALLEY UNIFIED SCHOOL
DISTRICT,

OAH CASE NO. 2012120842

ORDER FOLLOWING PREHEARING
CONFERENCE GRANTING
CONTINUANCE AND SETTING NEW
DATES

On February 20, 2013, a mandatory telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH).¹ James D. Peters III, a paralegal for attorney Peter D. Collisson, appeared on behalf of Student and Parents (Student).² Attorney Vivian E. Billups appeared on behalf of the Chino Valley Unified School District (District). The PHC was recorded.

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

² Mr. Peters represented that Mr. Collisson was unavailable for the PHC and had authorized Mr. Peters to handle it. When the ALJ expressed concern for the absence of the family's attorney, Mr. Peters represented that Mr. Collisson "may" be in another hearing but did not know what case it might be, did not know Mr. Collisson's schedule, and asserted that Mr. Collisson had "assigned" the present matter to him. Mr. Peters could not say whether Mr. Collisson would be available by telephone to consult for legal decisions regarding the matters covered during the PHC, if any. When asked to clarify his role, Mr. Peters stated he was not acting as an advocate representing the family but solely as Mr. Collisson's paralegal. Counsel for the District objected to Mr. Peters' representation of Student during the PHC, indicated she had never met Mr. Collisson, and argued Mr. Peters was acting as an advocate. For purposes of the PHC only, District's objection was overruled but did not excuse Mr. Collisson's absence. When the ALJ inquired as to Mr. Collisson's legal representation of Student for hearing, Mr. Peters represented that Mr. Collisson would appear at the hearing to

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

1. Continuance, Hearing Dates, Times, and Location: This matter was scheduled for a due process hearing to begin on Thursday, February 28, 2013, to continue thereafter day to day (Monday through Thursday) at the discretion of the ALJ presiding over the hearing. During the PHC, the parties estimated the hearing may take eight days. District moved to continue the hearing to consecutive hearing dates and Student concurred. The motion was granted in the interests of judicial efficiency and economy so the ALJ and others would not have to travel for one isolated day of hearing before the matter was continued.

After consultation with the calendars of the parties, the hearing dates are confirmed. **The hearing shall take place on March 5 through 7, and 18 through 21, 2013, for a total of seven days of hearing. In the event another day of hearing is necessary, the hearing may be continued to Friday, March 22, 2013, at the discretion of the assigned ALJ, unless otherwise ordered.**

The hearing shall begin at 9:30 a.m. on March 5, at 1:30 p.m. on March 18, 2013, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at the West End SELPA, 8265 Aspen Avenue, Suite 200, Rancho Cucamonga, California 91730.³

2. 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 without need for a subpoena. 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.

3. Issues: The issues for hearing are limited to those alleged in each party's respective request for due process (complaint). The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.⁴

represent Student "some" of the time but Mr. Peters intended to handle most, if not all of the hearing. Moreover, Mr. Peters did not have Mr. Collisson's calendar when he agreed to the continued dates herein. OAH will therefore address Mr. Collisson's absence in this case in a separate order.

³ 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.

⁴ 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).)

Student's Issues:

In connection with all of Student's relevant individualized education programs (IEP's) for the 2010-2011 school year, beginning on December 26, 2010, and for the 2011-2012 and 2012-2013 school years,⁵ did District deny Student a free appropriate public education (FAPE) by:

- (1) Failing to offer Student appropriate speech and language therapy services, as follows:⁶
 - (a) Appropriate intensive individual speech and language therapy;
 - (b) Appropriate social peer interaction group sessions; and
 - (c) Appropriate sensory diet and sound therapy;
- (2) Failing to offer Student appropriate assistive technology (AT) and alternative augmentative communication (AAC) supports in the form of an iPad, a computer device, and appropriate software to aid Student in the areas of communication, speech, and writing;
- (3) Failing to offer Student appropriate applied behavior analysis (ABA) services in the form of an aide from the Center for Autism and Related Disorders (CARD) for Student's full school days;
- (4) Failing to offer Student an appropriate inclusive educational placement in the least restrictive environment (LRE) in a general education math class; and
- (5) Failing to implement provisions of Student's applicable IEP's as follows:
 - (a) Within the two years preceding the filing of Student's complaint, failing to provide IEP-required CARD aide services for Student's full school days, and

⁵ District's objection that Student's complaint only identified two IEP's by date and failed to identify each and every IEP at issue was overruled. Since all IEP's during the time frame are at issue the law does not require further specificity. On the record, Student identified the IEPs, which begin with District's January 20, 2011 IEP and end with the IEP of May 3, 2012.

⁶ Student agreed during PHC that his use of the phrase "failed to provide" in his complaint was intended to mean "failed to offer," except for discreet issues of failure to implement IEP provisions that have been separated out as Student's fifth issue.

- (b) Since November 2012, failing to provide IEP-required speech and language services?

District's Issue:

During the PHC, District withdrew its first problem as set forth in its complaint and it is no longer at issue. The sole remaining issue for District is as follows:

6. In connection with District's triennial IEP for Student dated May 3, 2012, did District comply with the law in offering to conduct, and in conducting Student's triennial assessments in the following areas related to his disability:
- (a) Psychoeducational;
 - (b) Speech and language; and
 - (c) Occupational therapy?

Proposed Resolutions:

Student: Student's request for OAH to issue an order for legal fees is dismissed as not within the jurisdiction of OAH. Student's request for OAH to issue orders for reimbursement to Parents for educational costs incurred was clarified as follows, subject to evidence to be produced at hearing: Parents claim to have incurred about \$12,000 for private services for Student during the relevant time frame, including speech and language assessments and services.⁷ Student also claimed a right to reimbursement for the costs of "educational consultants" but did not specify who they were or what the amounts might be.

District: District requests a determination from OAH that its 2012 triennial assessments of Student in the above areas were appropriate. If so, the law would relieve District from being required to fund IEE's in those areas under the assessment laws.

4. Exhibits: Exhibits shall be pre-marked and placed in three-ring exhibit binders 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 unless otherwise agreed

⁷ Since Student's case does not involve any issue of a failure to appropriately assess him, the ALJ clarified and the parties understand that any reimbursement claim for assessment costs would be as an equitable remedy and not as independent educational assessment (IEE) under the assessment laws pursuant to Education Code section 56320, et seq.

upon.⁸ 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.

5. Witnesses: **Prior to the due process hearing, the parties shall informally meet and confer to formulate their witness schedules. At the commencement of the hearing, the parties will present the witness schedules.** The ALJ and the parties will discuss the 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 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.

At the present time, Student intends to call the following 14 witnesses from the 38 witnesses listed in his PHC statements: Jennifer Even (medical center speech and language pathologist); Mr. Krishnappa (speech and language therapist); Sherry Morton (special education teacher); Felicia Talaogon (special education teacher); Gabe Delfin (case carrier); Dorothy Somers (speech and language therapist); Mother and/or Father (parents); Shawna Petit-Dinkins (SELPA director); Christina Mikuljan (SELPA program specialist); Christene Hinkle (assistant principal); Lady "Christene" aka Diva (District transition specialist); Dr. Wayne Sailor (communications, educational psychology); Romelea Manuacal (CARD case supervisor); and Theresa Bartholomew (past CARD supervisor).⁹

At the present time, District intend to call the following eight witnesses from the 25 witnesses listed in its PHC statements: Bindiya Gordhan (occupational therapy specialist);

⁸ Education Code section 56505, subdivision (e)(7).

⁹ District's objections to Dr. Sailor were overruled. Although not separately identified as an expert in Student's PHC statement as required by the OAH scheduling order, Dr. Sailor was listed in Student's general witness list with an out-of-state address at the University of Kansas. In addition, OAH's scheduling order no longer requires an expert's curriculum vitae (CV) to be served with the PHC statement and Student listed the witness's CV in his amended exhibit list (S-62).

Dorothy Somers (speech and language specialist); Katie Ellis (school psychologist); Sharon Morton (special education teacher); Gabriel Delfin (special education teacher); Anne Ingulsrud (District coordinator); Patricia Mbugua and/or Christina Mikuljan (program specialist); and Sergio Robleto (general education teacher).

6. 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 this PHC. The following motions were briefly discussed during the PHC:

(a) Motion for Telephonic Testimony: On the morning of February 20, 2013, prior to the start of the PHC, Student filed and served a Motion to Allow Testimony by Telephone. Student seeks to take the testimony of Dr. Sailor, Theresa Bartholomew, and Vince Redmond (a CARD representative). District objected and OAH permits three business days within which to file written opposition. District's request to file a written reply was granted. District has until close of business on Monday, February 25, 2013, within which to file and serve a reply. Student has until close of business on Tuesday, February 26, 2013, within which to file a final reply, following which OAH will rule on the motion and no further replies will be considered.

(b) Motion for Television and Media Coverage of the Hearing: On the morning of February 20, 2013, prior to the start of the PHC, Student filed and served a Motion to Allow Television and Media in the Courtroom Proceedings and Motion to Allow Personal Recording Devices to be used. As clarified during the PHC, Student's motion includes seeking permission to bring a cameraman and recording equipment into the hearing room to video-record the hearing for subsequent dissemination to others. District's request to file a written opposition was granted. District has until close of business on Monday, February 25, 2013, within which to file and serve a reply. Student has until close of business on Tuesday, February 26, 2013, within which to file a final reply. Student's final reply should also disclose whether public news media are anticipated and, if so, the identity and number of the media persons or entities to the extent known. OAH will thereafter rule on the motion and no further replies will be considered.

(c) Motion to Amend Complaint: During the PHC, Student claimed that Parents were denied meaningful participation in District's IEP dated May 3, 2012, because Parents did not attend the IEP team meeting. However, there is no such procedural claim within the four corners of Student's complaint. Student orally moved to amend the complaint. The ALJ declined to entertain the motion from Mr. Peters.

The filing of an amended complaint restarts the applicable federal and California statutory timelines for the due process hearing unless the parties waive application of that requirement. (20 U.S.C. §1415(c)(2)(E)(ii).) Hence, this motion affects the fundamental due process hearing rights of Student and Parents. Since he is not acting as an advocate for the family, Mr. Peters has no authority as a paralegal to independently waive the family's rights under the law to a timely hearing and to restart all timelines were the motion to be granted. Mr. Peters is directed to consult with his employing attorney, Mr. Collisson, so that the

attorney of record may provide legal advice to Student and Parents regarding a motion to amend Student's complaint. Any motion to amend Student's complaint should address the waiver of rights issue and should be filed in sufficient time to allow the District three business days within which to reply and for OAH to rule on the motion not less than five days prior to the commencement of the hearing. (20 U.S.C. §1415(c)(2)(E)(i).)

7. 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.

8. Open Hearing: Consistent with Student's request, the hearing shall be open to the public. By close of business on February 26, 2013, either in conjunction with his final reply on the media motion, as ordered above, or in a separate letter, Student shall file and serve notice of the estimated number of members of the public anticipated to attend the hearing, so the District has notice of the approximate hearing room size needed to accommodate the public.

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

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 electronic devices shall be turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

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. Any party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

12. Settlement: The parties are encouraged to negotiate 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 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.

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

Dated: February 21, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings