

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2012110641

ORDER FOLLOWING PREHEARING
CONFERENCE

On February 25, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Attorney Natashe Washington appeared on behalf of Student and Parents (Student). Attorney Matthew Juhl-Darlington appeared on behalf of the Mt. Diablo Unified School District (District). The PHC was recorded.

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

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on March 5 through 7, 2013, for a total of three days of hearing. The hearing shall begin at 9:30 a.m. on March 5, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 1936 Carlotta Drive, Special Ed. Annex, Room 24 Concord, California 94519.¹

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.

¹ 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. Due to District's concern for the size of the hearing room, District will file and serve written confirmation of the hearing location by close of business on Wednesday, February 27, 2013.

3. Issues: The issues for hearing are limited to those alleged in Student's request for due process (complaint). The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.²

Issue 1: Did District deny Student a free appropriate public education (FAPE) for the 2012-2013 school year by failing to timely conduct an individualized education program (IEP) team meeting after Parents requested an assessment in May 2012?³

Issue 2: Did District deny Student a FAPE for the 2012-2013 school year by failing to make a formal, specific written offer of FAPE that identified the proposed program (placement and related services), and the start date, frequency, location, and duration of the program?

Issue 3: Did District deny Student a FAPE for the 2012-2013 school year by failing to timely conduct a IEP team meeting after Parents request for an IEP on August 28, 2012, which significantly impeded Parents' ability to meaningfully participate in Student's educational decision-making process?

Proposed Resolutions and Defenses: Student's proposed resolutions and District's defenses were briefly discussed during the PHC. Student is directed to Paragraph 12 of this order regarding evidence for proposed remedies. District retains the right to present all relevant defenses during the hearing including claims regarding Student's enrollment and parental nonparticipation.

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.

² 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).) Here, Student's original first issue has been reversed and is now the second issue. Some words have been modified to conform to the applicable law but no issues have been amended except as indicated in Footnote 3 below.

³ Student's unopposed motion to amend her complaint to correct a typographical error was granted and the reference in Student's first issue to May 2011 was changed to May 2012.

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.⁴

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 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 50 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 and District each intend to call most or all witnesses listed in their PHC and amended PHC statements (four, and eight witnesses respectively).

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).) The parties did not request the telephonic testimony of any witness during the PHC. 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 exhibits 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

⁴ Education Code section 56505, subdivision (e)(7).

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.

7. Order of Presentation of Evidence and Scope of Examination: Student shall produce her 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. 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 unless otherwise ordered.

8. Open Hearing: Consistent with Student's request, the hearing shall be open to the public. Student anticipates not more than five members of the public in attendance.

9. 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.⁵

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

11. 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.

12. 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.

13. 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,

⁵ Student made identity and relevance objections regarding some of District's witnesses, which were premature. The ALJ declined to rule on the objections in advance of the hearing, and Student has the right to renew the objections at hearing.

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.

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

Dated: February 25, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings