

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT.

OAH CASE NO. 2012080424

ORDER FOLLOWING PREHEARING
CONFERENCE GRANTING MOTION
TO AMEND COMPLAINT

On February 27, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH).¹ Attorney Susan Foley appeared on behalf of Student and Parent (Student). Attorney Melanie D. Seymour appeared on behalf of the San Mateo-Foster City 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 in his request for a due process hearing (complaint) were discussed and clarified. It became apparent that Student's issues, based on claimed denials of his right to a free appropriate public education (FAPE) beginning on August 27, 2010, did not set forth all problems intended by him. During the PHC, Student moved to amend the first and third issues in his complaint. District opposed the motion. District did not make a 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).)

Hearing in this case is set for March 12 through 14, 2013. Student's motion provides the ALJ with sufficient time to issue a ruling more than five days prior to the commencement of the hearing, and is therefore timely. During the PHC, the ALJ found that Student's

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

complaint sets forth specified problems as listed below related to three individualized education program (IEP) offers. The ALJ found Student's problems related to his first and third IEP's did not involve any claims of substantive denials of FAPE based on District's failure to offer an appropriate educational placement in a class with a lower teacher-to-student ratio. In addition, the ALJ found that Student's third issue did not involve any claim of denial of FAPE based on District's failure to offer appropriate speech and language services. Student therefore requested to amend his complaint to add those claims. Student's motion is reasonable, and in the best interests of justice and judicial efficiency. The proposed amendments relate to the same time frame and the same IEP's as his other issues, and should not be heard piecemeal in separate hearings with overlapping witnesses unless necessary. Accordingly, Student's motion is granted as ordered below.²

Order: Student has until close of business on Friday, March 1, 2013, within which to file and serve an amended complaint. Upon the timely 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 March 12 through 14, 2013. Unless otherwise ordered, the hearing shall begin at 9:30 a.m. on March 12, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 1170 Chess Drive, Foster City, California 94404.³

3. 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.

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 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. Issues: The issues for hearing are limited to those alleged in Student's complaint.⁴ The issues were discussed during the PHC, and are reframed, reorganized, and clarified below.

Issue A: Did District's IEP dated August 27, 2010 deny Student a FAPE because District:⁵

(1) Predetermined Student's special education placement and services in advance of the IEP team meeting, thereby significantly impeding Parent's right to meaningfully participate in the IEP decision-making process;

(2) Failed to offer Student an educational placement with adequate supervision to ensure his safety;⁶

(3) Failed to offer Student an extended school year (ESY) placement and services for the 2011 ESY; and

(4) Failed to offer Student any related services in the following areas related to his disability: (a) speech and language therapy services, and (b) occupational therapy services?

Issue B: Did District's continuation or addendum IEP dated October 5, 2010 deny Student a FAPE because District offered Student speech and language services in a group setting and failed to offer the services on an individual basis?⁷

Issue C: Did District's annual IEP dated June 17, 2011 deny Student a FAPE because District:

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).)

⁵ Student indicated that his issues related to the August 2010 IEP are claimed as continuing violations in subsequent IEP's, to the extent District did not make superseding offers related to the same issues. With respect to the June 2011 IEP, described as an annual IEP, the ALJ questioned that theory, given the annual nature of the IEP and Student's narrow description of the problems related to that IEP in his complaint. The parties may address the matter of continuing violations at hearing.

⁶ Student's safety issue is described in his complaint as a denial of FAPE issue and is consequently included although not discussed at length during the PHC.

⁷ Student clarified that, although his complaint included language about the inadequate duration of speech and language services, duration of the services is not an issue in this proceeding.

(1) Failed to offer Student an educational placement with adequate supervision to ensure his safety;

(2) Failed to offer Student ESY placement and services for the 2011 ESY;

(3) Failed to assess Student's occupational therapy needs in the areas of fine motor, gross motor, and sensory integration in connection with the IEP team meeting; and

(4) Failed to offer Student appropriate occupational therapy goals and services in the above areas related to his disability?⁸

5. 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.⁹

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.

6. 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.

⁸ Student clarified that the only annual goals at issue in this proceeding are those related to occupational therapy.

⁹ 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.

At the present time, Student and District intend to call most, if not all, of the witnesses listed in their respective PHC statements. All objections as to the relevance of the witnesses' testimony are reserved for hearing.

7. 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, neither party requested the telephonic testimony of a witness.

8. Order of Presentation of Evidence and Scope of Examination: 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. 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.

9. Open Hearing: At the request of Student, the hearing shall be open to the public, with an estimate of not more than five members of the public. Student shall notify District in advance of hearing of any material change in that estimate for purposes of ensuring a hearing room of adequate size.

10. 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.

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

12. 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.

13. 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.

14. 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.

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

Dated: February 27, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings