

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

EDUCATIONAL RIGHTS HOLDER ON
BEHALF OF STUDENT,

v.

CONTRA COSTA COUNTY OFFICE OF
EDUCATION AND CONTRA COSTA
COUNTY PROBATION DEPARTMENT.

OAH CASE NO. 2013080471

ORDER FOLLOWING PREHEARING
CONFERENCE; ORDER GRANTING
MOTION TO BIFURCATE; AND
ORDER GRANTING MOTION TO
CONTINUE

On September 16, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Mary Lee Smith and Rebecca Williford, Attorneys at Law, appeared on behalf of Student. Jennifer Rowe Gonzalez, Attorney at Law, appeared on behalf of Contra Costa County Office of Education (CCCOE). Christina Ro-Connolly, Attorney at Law, appeared on behalf of Contra Costa County Probation Department (CCCPD). The PHC was recorded.

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

1. Motion to Bifurcate. On September 11, 2013, CCCPD filed a motion to bifurcate the issue for hearing that concerned whether CCCPD was a proper party to this action because it is not a responsible public agency under special education laws. (34 C.F.R. § 300.33; and Ed. Code, §§ 56028.5 56500, and 56501, subd. (a).) CCCPD requested that this preliminary issue be bifurcated from the issue of whether CCCPD denied Student a free appropriate public education (FAPE). On September 13, 2013, Student filed an opposition to the motion to bifurcate. CCCOE 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).)

Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to “the public agency involved in any decisions regarding a pupil.” (Ed. Code, § 56501, subd. (a).) A “public agency” is defined as “a school

district, county office of education, special education local plan area, . . . or any other public agency . . . providing special education or related services to individuals with exceptional needs.” (Ed. Code, §§ 56500 and 56028.5.)

Title 34, Code of Federal Regulations, parts 300.33 states that a “[p]ublic agency includes the SEA [state educational agency], LEAs [local educational agencies], ESAs [educational service agencies], nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.”

Children placed in a juvenile hall are entitled to a FAPE. (Ed. Code, § 56150.) Juvenile court schools provide educational services to all students “detained” in juvenile halls. (Ed. Code, § 48645.1) Regardless of the residence of the parents or legal guardians of such children, the responsibility for providing a FAPE to any student who is detained in juvenile hall rests with the local county board of education. Education Code, section 48645.2 provides that county board of education shall operate juvenile court schools, or contract out their operation with the respective elementary, high school, or unified school district in which the juvenile court school is located.

CCCPD established good cause to bifurcate issues for hearing that involve whether CCCPD is a public agency responsible for providing Student with a FAPE and the ultimate issue of whether CCCPD and CCCOE denied Student a FAPE while in juvenile hall. The issue of public agency responsibility is sufficiently separate than those issues that pertain to the ultimate provision of FAPE that judicial economy requires that this issues be tried separately to determine if CCCPD is an appropriate party. Accordingly, Student’s complaint is bifurcated, and shall proceed first as to the issue for hearing whether CCCPD is a responsible public agency to provide Student with a FAPE.

a. The issue whether CCCPD is a responsible public agency shall proceed to hearing on October 2, 2013, at 9:30 a.m. and October 3, 2013 at 9:00 a.m., at CCCPD’s office at 202 Glacier Drive, Martinez, California 94553.¹

b. Student and CCCPD shall submit pre-trial briefs of no more than 30 pages by 5:00 p.m. on September 27, 2013, as to whether CCCPD is a responsible public agency to provide Student with a FAPE.² In the pre-trial brief, the parties shall synopsise the expected

¹ At a minimum for the hearing in this matter, 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 CCCOE’s and CCCPD’s representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. CCCPD shall ensure that all parties and the ALJ have drinking water and tissue available to them and that room is wheelchair accessible.

² CCCOE may, but is not required to submit a pre-trial brief.

testimony and evidence. Additionally, the parties shall analyze any applicable cases from other states and policy letters developed by the Office of Civil Rights and/or Office of Special Education Programs. Finally, the parties shall brief whether CCCPD is a public agency pursuant to 34 Code of Federal Regulations, parts 300.33 (2006), and California Education Code, section 56501, subdivision (a), as discussed in *Student v. California Department of Mental Health* (October 26, 2009) Cal.Ofc.Admin.Hrngs. Case No. 2009050920; *Student v. Mt. Diablo Unified School District County of Sacramento Probation Department, et al*, (June 2, 2009) Cal.Ofc.Admin.Hrngs. Case No. 2009050043; and *Student v. County of Sacramento, Child Protective Services* (March 20, 2012) Cal.Ofc.Admin.Hrngs. Case No. 2012020586.)

c. Exhibits. Exhibits for the bifurcated hearing shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. CCCOE and CCCPD shall prepare a joint evidence binder. The parties shall use numbers to identify exhibits, but shall place the letter “S” or “C” in front of the exhibit to designate if it is a Student or CCCOE/CCCPD exhibit (for example, “S-5, S-6”, “C-1, C-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 September 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.

d. 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 September 30, 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 October 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.

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.

e. 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.

f. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student, CCCPD and then CCCOE. 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.

g. 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.

h. Special Needs and Accommodations. CCCPD shall ensure that the hearing location and services inside the building are wheelchair accessible.

i. Hearing Open/Closed To the Public. Student shall inform OAH and the other parties by September 23, 2013, whether Student wishes the hearing to be open to the public.

2. CCCOE's Continuance Request. On September 16, 2013, CCCOE filed a request for a continuance to scheduling conflict for events that were scheduled before the August 15, 2013 scheduling order. Student objected to the continuance request because of Student's right to a hearing within the statutory timelines because of the loss of educational benefit. 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).) CCCOE established good cause for a brief continuance in this matter due to do pre-existing scheduling conflicts and to allow this matter and OAH Case Nos. 2013080449 and 2013080471 to be heard separately.

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

Therefore, the PHC and the due process hearing are continued. The PHC shall take place on October 4, 2013, at 10:00 a.m.,⁴ and the due process hearing shall take place on October 14 - 18, 2013. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for October 14, 2013, on which day the hearing shall start at 1:30 p.m., unless otherwise ordered. The hearing shall take place at CCCPD's office at 202 Glacier Drive, Martinez, California 94553.

3. 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.

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

IT IS SO ORDERED.

Dated: September 16, 2013

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings

⁴ The parties need not file additional PHC statements, and any amendments are due to OAH and opposing parties by 5:00 p.m. on September 30, 2013.