

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MILL VALLEY ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2013071252

ORDER FOLLOWING PREHEARING
CONFERENCE

On September 6, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH). Brett Allen, Attorney at Law, appeared on behalf of Student. Lenore Silverman, Attorney at Law, appeared on behalf of District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The District filed a motion to continue the due process hearing the morning of the PHC, claiming that its attorney had several due process hearings scheduled in September, October, and November 2013, and therefore she was seeking a continuance until December 2, 2013, the first date she believed she was available. Student opposed the length of continuance being requested by the District.

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 for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored. Good cause may include the unavailability of a party, counsel, or an essential witness due to death, illness or other excusable circumstances; substitution of an attorney when the substitution is required in the interests of justice; a party's excused inability to obtain essential testimony or other material evidence despite diligent efforts; or another significant, unanticipated change in the status of the case as a result of which the case is not ready for hearing. (See Cal. Rules of Court, rule 3.1332(c).) OAH considers all relevant facts and circumstances, including the proximity of the hearing date; previous continuances or delays; the length of continuance requested; the availability of other means to address the problem giving rise to the request; prejudice to a party or witness as a result of a continuance; the impact of granting a continuance on other pending hearings; whether trial counsel is engaged in another trial; whether the parties have stipulated to a continuance; whether the interests of justice are served by the continuance; and any other relevant fact or circumstance. (See Cal. Rules of Court, rule 3.1332(d).)

The ALJ considered the oral arguments of the parties, and the hearing is continued on motion of the District and shall take place beginning on September 23 through 26, 2013, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m. with the exception of the first day of hearing, on which day the hearing shall begin at 1:30 p.m., unless otherwise ordered.¹

The hearing shall take place at the District's offices located at **Mill Valley Elementary School District, 411 Sycamore Avenue, Mill Valley, California 94941.**² 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.

a) Did the District deny Student a free appropriate education (FAPE) by failing to provide comprehensive assessments of him in all areas of suspected disability from at least July 1, 2011, to the present?

b) Did the District deny Student a FAPE by failing to tailor an appropriate educational program (meaning placement and related services) to meet his individual and unique needs, from July 1, 2011, to the present?

c) Did the District violate Student's and Parent's procedural rights by failing to provide Parent with a complete copy of Student's educational records following a request on May 30, 2013?

The proposed resolutions are as follows:

a) The District shall fund the following independent educational evaluations (IEE's): a neuropsychological assessment; a functional analysis (behavior) assessment; a speech and language assessment; a mental health assessment; a speech and language assessment; an occupational therapy (OT) assessment; and an assistive technology (AT) assessment.

¹ There is further discussion about the motion to continue this case in the section concerning prehearing motions.

² 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 available to them and tissue on the witness table during the hearing.

b) The District shall provide Student with compensatory education in all areas of need as identified by the IEE's, including but not limited to intensive one-to-one academic instruction and/or educational therapy; speech and language services; AT services; OT services; and counseling services.

c) The District shall pay all costs for Sterne School for the 2013-2014 school year (SY).³

d) The District shall reimburse Parent for all educationally related expenses incurred from July 1, 2011 to the present including, but not limited to Stern School costs, tutoring, counseling, etc.

e) The District shall produce all of Student's cumulative school records from kindergarten to the present.⁴

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. 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 District exhibit (for example, "S-5, S-6, or 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. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7). 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.

In the event that a party objects to the admission of a document, the other party should be prepared during the hearing to make an offer of proof as to each exhibit the party seeks to move into evidence. Inclusion of a document in the evidence binder is not a guarantee of admission.

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.

³ This was included as an issue, but it actually is a proposed resolution, and is being treated as such.

⁴ Education Code section 56504 requires a school district to provide a parent with a student's school records within five business days after request. In his complaint and prehearing conference statement Student lists several types of documents he claims are school records that he should receive. Student and the District should be prepared to argue as to whether specific documents are in fact "school records," should they disagree.

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 5:00 p.m. on September 19, 2013, as to the schedule of witnesses. The parties shall 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. If agreement cannot be reached, Student should be prepared to have witnesses available to testify on September 23, 2013. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.⁵

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. The parties shall be prepared to make an offer of proof to what a witness will testify, and how this testimony is relevant should a witness be challenged.

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).) Neither party has requested telephonic testimony by a witness. In the event such a request is made, the party seeking to present a witness by telephone shall move in advance for leave to do so. 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.

⁵The parties are encouraged, but not ordered to provide résumés or curriculum vitae of witnesses who are testifying in their professional capacity. The parties shall make every effort to ensure that these documents are exchanged in a timely manner prior to the hearing. If these documents are not exchanged in a timely manner, the ALJ conducting the hearing shall determine whether or not they should be admitted, if a party objects to admission.

7. Motions. Two motions were heard during the PHC.

Preemptory Challenge

At the beginning of the prehearing conference, immediately after the case was called, the ALJ informed the attorneys that the PHC and the hearing were assigned to her, and asked if either party wished to challenge her.⁶ Each attorney replied “No.” The ALJ then proceeded to question the attorneys about the District’s recent motion to continue the due process hearing, and there was some discussion and some argument about the motion. The ALJ then called a 30 minute recess so she could discuss a possible continuance the PALJ, who determines the calendaring of cases, and encouraged the parties to talk with each other during the recess to see if they could find mutually agreeable dates for a continuance. When the PHC resumed, the attorney for the District informed the ALJ that she had telephoned her client during the recess and been informed that the District wished to exercise its preemptory challenge against the ALJ. The ALJ denied the request because the PHC had already begun. (Cal. Code Regs., tit. 1, § 1034, subds. (a) & (b); Gov. Code, § 11425.40, subd. (c).)

Motion to Continue

In regards to the District’s motion to continue, as previously discussed, this motion was granted, although the case was only continued four days, rather than the nearly eight weeks requested by the District. Student argued that delaying the hearing to December would create a serious hardship for Parent. The ALJ was informed by the attorneys that they have another matter where they represent another student and school district, and the hearing in that matter is to begin on September 23, 2013. Since the PHC in the instant matter precedes the PHC in that matter, the hearing in the instant matter is continued to September 23, 2013. The attorneys are encouraged to meet and confer with each other concerning scheduling issues in the other case.⁷

Other than a possible motion by District challenging the ALJ for cause, no other pretrial motions are pending or contemplated. Any motion other than a motion challenging the ALJ for cause filed after September 6, 2013, the date of the PHC, 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 prehearing conference.

⁶ Each party in a case is entitled to one preemptory challenge (disqualification without cause) to an ALJ assigned to an OAH hearing. (Cal. Code Regs., tit. 1, § 1034, subds. (a) & (b); Gov. Code, § 11425.40, subd. (d).)

⁷ At least 95 percent of all cases filed with OAH settle before the date the due process hearing is to begin. Accordingly, it is quite likely that the attorney for the District will not have a scheduling conflict when this hearing begins on September 23, 2013. In the event that a scheduling conflict does exist in the other case, the PALJ or ALJ conducting the PHC in that case will address the need for a continuance of that hearing.

8. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

9. 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.

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

11. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services.

12. Hearing Open/Closed To the Public. The hearing will be closed to the public.

13. Audio Recording of the Hearing. Both parties indicated that they would be audio recording the hearing. OAH always makes a digital recording of the proceedings, and this recording is the official record of the hearing. Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is “off the record.” Any violation of this order to turn off recorders when the matter goes off the record may result in the revocation of permission to record the hearing, and an order to destroy the previous recording. Further, the parties may not ask for a break if there is some malfunction of their recording equipment.

14. Settlement. The parties are encouraged to continue working together 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. In addition, if a settlement is reached within five days of the scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER 5:00 P.M. THE DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE at 916-376-6319.

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. The assigned ALJ will check for messages the evening prior to the hearing or 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: September 10, 2013

/s/

REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings