

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

IRVINE UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013080703

ORDER FOLLOWING PRE-HEARING
CONFERENCE

On September 9, 2013, Administrative Law Judge (ALJ) Darrell Lepkowsky, of the Office of Administrative Hearings (OAH), convened a telephonic prehearing conference (PHC) in this matter. Alefia Mithaiwala, Attorney at Law, appeared on behalf of the Irvine Unified School District (District). Vanessa Jarvis, Attorney at Law, appeared on behalf of Student. The ALJ recorded the prehearing conference.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on September 17, 18, and 19, 2013, **at the District's Westwood Training Center located at 1 Liberty, Irvine CA 92620.** The hearing shall continue day to day thereafter, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall begin at 9:30 a.m. on the first day of the hearing, and at 9:00 a.m. all others days unless otherwise ordered.

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. Issue for hearing: Does the District's offer contained in Student's June 7, 2013 annual individualized education program (IEP) constitute a free and appropriate public education (FAPE) in the least restrictive environment?

The District seeks an order from OAH that its offer constitutes a FAPE in the least restrictive environment and that it may implement its June 7, 2013 IEP offer in its entirety without the consent of Student's parents.

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. 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.

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 Wednesday, September 11, 2013, as to the schedule of witnesses. Student shall inform the District by that time whether he will be able to produce his mother as a witness or whether the District must subpoena her.

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. Unless otherwise ordered, only one round of re-direct and/or re-cross shall be permitted.

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).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. 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.

District’s motion to have witness Mary Bevernick testify by telephone on September 19, 2013, is granted pursuant to the requirements discussed above.

7. Order of Presentation of Evidence. The District filed for due process in this case and therefore will present its witnesses first.

8. Motions. At the PHC, counsel for Student informed the ALJ that Student had filed a due process complaint on August 30, 2013. OAH recently designated Student's case as OAH Case No. 2013090202. Student made an oral motion at the PHC to consolidate his case with the instant case. The District opposed the motion.

Although no statute or regulation specifically provides a standard to be applied in deciding a motion to consolidate special education cases, OAH will generally consolidate matters that involve: a common question of law and/or fact; the same parties; and when consolidation of the matters furthers the interests of judicial economy by saving time or preventing inconsistent rulings. (See Gov. Code, § 11507.3, subd. (a) [administrative proceedings may be consolidated if they involve a common question of law or fact]; Code of Civ. Proc., § 1048, subd. (a) [same applies to civil cases].)

In the instant case, the District contends that its June 7, 2013 IEP offer to Student constitutes a FAPE. Student's due process complaint alleges that the District breached a settlement between the parties when it filed the complaint at issue in this case. Student makes no allegations in his due process complaint addressing whether the District's IEP offer is appropriate. The issues in the two complaints do not involve common questions of fact or law. The ALJ therefore denied Student's motion to consolidate without prejudice. If Student chooses to file a written motion to consolidate, Student must indicate why this motion was not made at the time Student filed his complaint in Case No. 2013090202, or, at the latest, why a written motion was not made prior to the PHC in the instant case.

The Order denying Student's motion to consolidate does not affect Student's ability to raise as an affirmative defense to the instant case the issue of whether the parties' settlement agreement precludes the District from litigating the viability or appropriateness of its June 7, 2013 IEP offer to Student.

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

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

11. Special Needs and Accommodations. A Vietnamese language interpreter is required for this hearing.

12. Hearing Closed to the Public. At the request of Student's parent, the hearing will be closed to the public.

13. 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.

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

IT IS SO ORDERED.

Dated: September 9, 2013

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings