

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN MATEO UNION HIGH SCHOOL
DISTRICT.

OAH Case No. 2013090550

ORDER FOLLOWING PREHEARING
CONFERENCE; GRANTING
CONTINUANCE; AND SETTING DUE
PROCESS HEARING

On October 28, 2013, a telephonic prehearing conference (PHC) was held before Presiding Administrative Law Judge (ALJ) Bob N. Varma, Office of Administrative Hearings (OAH). Brett S. Allen, Attorney at Law, appeared on behalf of Parent on Behalf of Student (Student). Kathryn E. Meola, Attorney at Law, appeared on behalf of the San Mateo Union High School District (District). The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing is continued on motion of Student and shall take place on November 13, 14, and 19 – 21, 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 9:30 a.m., unless otherwise ordered. The hearing shall take place at the District's offices located at 650 N. Delaware Street, San Mateo, CA 94401.¹

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 hearing are listed below. The issues are those set out in Student's complaint, PHC statement and as discussed and modified at the PHC.

¹ The hearing room shall be capable of being set up similar to a courtroom, with 1) a separate table for Student and her representatives; 2) a separate table for District and its representatives; 3) a separate table for the witness; and, 4) a separate table for the ALJ close to an electrical outlet. District shall ensure that the parties, witnesses and ALJ are provided drinking water.

a) Did District deny Student a free appropriate public education (FAPE) by failing to meet its child find obligations under the Individuals with Disabilities Education Act (IDEA)?

b) Did District deny Student a FAPE by failing to appropriately assess Student in all areas of suspected disability from September 13, 2011, to the present?

c) Did District deny Student a FAPE by failing to provide Student with special education and related services, including placement, from September 13, 2011, to the present?

d) Did District violate Student's procedural rights under the IDEA when it failed to provide prior written notice of its decision to not assess Student and thereby denied Student a FAPE because it denied Parents the right to participate in the decision-making process concerning Student's special education?²

e) Did District violate Student's procedural rights under the IDEA by failing to provide Parent with copies of Student's educational records and thereby denied Student a FAPE because it denied Parents the right to participate in the decision-making process concerning Student's special education?

f) *Proposed Resolutions:* Student requests that she be deemed eligible for special education; District be ordered to fund independent assessments in all areas of Student's suspected disabilities; District be ordered to provide compensatory education; District provide Parent copies of Student's educational records; and District be ordered to fund placement of Student in a nonpublic school.

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

² Student's complaint states that in January 2013 District presented Parent with an assessment plan, but never conducted the assessments listed on that plan. Student alleges that District did not provide prior written notice as to why it decided not to assess Student. At the PHC, Student's counsel stated that while he was not aware of any other time in the two years prior to the filing of the complaint that District should have provided prior written notice, he could not with certainty commit to the January 2013 period as the sole occasion where prior written notice was required. District objected to the broadness of the issue on the grounds that factual basis provided in the complaint only put it on notice with respect to the January 2013 period. At the PHC, the issue was left as phrased herein. However, if in the course of the hearing other events in other time periods are alleged as requiring prior written notice, District may raise any appropriate motions at that time.

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.

Student has identified 21 witnesses she intends to call. District has identified 53 witnesses it intends to call. Some of the witnesses are listed by both parties. In light of the fact that five days have been scheduled for the hearing in this matter, it would be difficult to complete the hearing as scheduled. 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 are ordered to meet and confer by November 5, 2013, as to the schedule of witnesses. By 5:00 p.m. on November 8, 2013, the parties shall serve upon each other, and OAH, a tentative witness list of witnesses the party intends to call, including an estimate of the time for direct examination of each witness.

The parties shall attempt to reach agreement on a witness list for the first day of hearing. The District shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of the 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 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. 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).) 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. Neither party requested telephonic testimony at this time.

7. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing. The parties shall comply by making timely and full disclosure of witnesses and evidence by November 5, 2013.

8. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student shall present her evidence and witnesses first, followed by District. If a witness will be called by both parties, both parties shall conduct their examination of that witness in one session so as to avoid having to recall the witness.

9. Motions. During the PHC the following motions were ruled upon.

Motion to Continue:

Student filed a motion to continue the hearing in this matter on October 28, 2013, asserting that Student's counsel was set for a hearing in another matter starting on November 5, 2013. OAH confirmed that Student's counsel was set for hearing in another matter and those dates were set on July 24, 2013, pre-dating the dates in this matter. District objected to the length of the continuance on the grounds that its representative, Gloria Dirkmaat, was set for a medical procedure in December 2013, which would make her unavailable until February 2014.

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).)

Here, Student established good cause for a continuance. However, District established good cause to limit the length of the continuance. Accordingly, the matter was continued to the dates set out above.

Educational Rights:

District brought a motion with respect to whether OAH has jurisdiction to hear this matter on the grounds that parents are separated and according to District staff's knowledge Father had sole custody of Student. District contended that as Mother had initiated this action, she lacked standing. Student asserted that the complaint was filed on behalf of both parents and that counsel represents Mother, Father and Student. Student further contended that there is no court order identifying which parent holds educational rights and that both parents hold educational rights over Student.

Following discussion at the PHC, a ruling on the motion was deferred. Student's counsel shall provide to District's counsel evidence that either Mother holds educational rights, or that Father has consented to the bringing of this action, by November 1, 2013. Upon having received said information, if District believes there still exists an issue as to jurisdiction, it may file any supplemental motion it deems appropriate.

Recording of the Hearing:

At the PHC, Student requested permission to record the hearing. District did not object. Student's motion is granted and both parties may audio record the hearing. However, OAH's recording of the proceeding shall be the official record and the parties are instructed they must turn off their recordings when OAH goes "off the record" during the hearing. Any delays or malfunctions in the parties' recordings shall not be grounds for OAH to stop its recording during the proceedings.

Any other prehearing motion filed after this date shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or during the prehearing conference of October 28, 2013.

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

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 noisemaking electronic devices shall be shut 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. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

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

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

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the 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 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.

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

IT IS SO ORDERED.

Dated: October 28, 2013

/s/

BOB N. VARMA
Presiding Administrative Law Judge
Office of Administrative Hearings