

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SUNNYVALE ELEMENTARY SCHOOL
DISTRICT.

OAH CASE NO. 2013080046

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 28, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Susan Ruff, Office of Administrative Hearings (OAH). Natashe Washington, Attorney at Law, appeared on behalf of Student and Student's parent (Student). Elizabeth Estes, Attorney at Law, appeared on behalf of the Sunnyvale Elementary 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 shall begin at 1:30 p.m. on November 12, 2013, shall continue at 9:30 a.m. on November 13 and 14, 2013, and shall continue day to day thereafter, Monday through Thursday as needed at the discretion of the ALJ. During the PHC, both parties stated that an additional day or two might be necessary for the hearing. Any need for additional hearing days will be discussed during the hearing with the ALJ hearing the case.

The hearing shall take place at:

Sunnyvale Elementary School District
819 West Iowa Ave.
Sunnyvale, CA 94088

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. The issues at the due process hearing are listed below.

a) Did the District deny Student a free appropriate public education (FAPE) during the 2012-2013 school year by failing to find Student eligible for special education and related services between June 2012 and December 17, 2012?

b) Did the District's offer(s) of placement in the December 17, 2012, January 25, 2013, March 12, 2013, and May 28, 2013 individualized education programs (IEP's) provide Student with a FAPE in the least restrictive environment (LRE)?

c) Did the District deny Student a FAPE by failing to properly address his behavioral problems from December 2012 to July 31, 2013?

d) Did the District deny Student a FAPE by failing to qualify him for extended school year (ESY) services during the summer of 2013?

e) Did the District deny Student a FAPE by failing to provide the designated instruction services (DIS) and resource program services (RSP) offered in the March 15, 2013 IEP?

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 consecutively paginated, for example by Bates-stamping. 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.

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.

7. Motions. On October 28, 2013, Student filed a motion to strike the District's late-filed PHC Statement. After discussion during the PHC, that motion was denied.

On October 18, 2013, the District filed a document entitled "Cross-Complaint for Due Process Hearing and Motion for Consolidation." California special education law does not provide for the filing of cross-complaints in due process matters. The District's "cross-complaint" is stricken from the record and the motion to consolidate is moot. If the District wishes to file its own due process case, it may do so and seek consolidation, but it cannot do so as a "cross-complaint" in the instant case.

On October 21, 2013, the District filed a separate document which, according to the fax cover sheet, was another "cross-complaint." That document contained the caption from the instant case but did not include a case number. It was entitled "Request for Expedited Due Process Hearing." It was not clear if the District was, once again, improperly attempting to file a "cross-complaint" or if the District intended the filing to be a motion to expedite the hearing in Student's case. OAH gave notice to the parties that it would be treating the request as a motion. Student filed an opposition to that motion on October 25, 2013.

During the PHC, the District clarified that it had intended to file a separate due process case, not a motion to expedite Student's case. To the extent that the District's filing was a motion, that motion is denied. To the extent that it was intended as a cross-complaint, that expedited cross-complaint is hereby stricken from this action. If the District wishes to file a request for an expedited hearing, it may do so as a separate action, not as a cross-complaint or a motion in the instant case.

During the PHC, Student made a motion to permit audio recording of the hearing. Student's motion is granted on following conditions: 1) The recording by OAH shall be official record of the hearing; 2) The District may also audio record the hearing; 3) The audio recording(s) shall remain confidential in the same manner and to the same extent as the hearing itself; 4) If a motion to exclude witnesses is made and granted, no portion of the audio recording shall be played to any potential witness in the case without explicit consent

from the ALJ hearing the case; 5) The recording equipment shall only be running when the hearing is “on the record” and the recording equipment shall be turned off during recesses, lunch and at any other time when the case is off the record; and 5) The hearing will not be stopped or delayed at any time to accommodate the recordings or any problems with the recording equipment; 6) Only audio recording is permitted; there will be no video recording; and 7) No one other than counsel for the Student and the District may record the hearing without permission from the ALJ.

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 or set to vibrate 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 To the Public. At the request of the parent, the hearing will be open 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 4:00 P.M. ON THE FRIDAY 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.

14. 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/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings