

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

CLOVIS UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2013090883

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 4, 2013, a mandatory telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings (OAH). Advocate Barbara Ransom appeared on behalf of Student and Parents (Student).¹ Attorney Karen E. Samman appeared on behalf of the Clovis Unified School District (District). The PHC was recorded.

Based on discussion with the parties, the following order is issued:

1. Hearing Dates, Times, and Location: The hearing dates are confirmed. The hearing shall take place on November 12 through 14, 20, and 21, 2013, for a total of five days of hearing.² Unless otherwise ordered, the hearing shall begin at 1:30 p.m. on November 12, and at 9:00 a.m. on all other days. The hearing shall be held at the District's offices at 1680 David E. Cook Way, Clovis, California 93611.³ The parties are directed to complete the hearing by the close of business on November 21, 2013. The hearing shall continue day to day, Monday through Thursday, as needed at the discretion of the ALJ.

¹ Ms. Ransom represented that Student's attorney, Yvette Sterling, was in court and unavailable to participate in the PHC.

² Although Student has decided not to call witnesses except in rebuttal, District's request to keep all five dates on calendar is granted in an abundance of caution. The parties are encouraged to cooperate to finish the hearing on November 14, 2013, if possible.

³ 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 and tissue available to them during the hearing.

2. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party without the need for a subpoena. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable.

3. (a) Issues: The issues for hearing are limited to those alleged in District's request for a due process hearing (complaint).⁴ The issues were discussed during the PHC, and are reframed and clarified below.

Issue 1: Was District's April 19, 2013 individualized education program (IEP) offer, developed at IEP team meetings on April 19, April 25, and May 13, 2013, reasonably calculated to provide Student with a free appropriate public education (FAPE)?⁵

Issue 2: Was District's IEP offer, as revised in a Prior Written Notice letter dated June 5, 2013, reasonably calculated to provide Student with a FAPE?

(b) Defenses and Proposed Remedies: Student retains the right to present all relevant defenses at hearing. District's complaint requests as its proposed remedy an order from OAH permitting District to implement its IEP without parental consent.

4. Student's Exhibits and Witnesses: The OAH scheduling order dated September 27, 2013, ordered Student to file a PHC statement at least three business days prior to the PHC. In connection with a PHC held on October 18, 2013, Student had not filed his statement. The ALJ at that PHC granted Student's request for a continuance and the order, dated October 21, 2013, ordered Student to file a PHC statement by October 30 2013, prior to the present PHC. Student has not filed a PHC statement as ordered by OAH. During the PHC, Student indicated that he does not have any witnesses or exhibits to present in his defense at hearing but reserves the right to call witnesses and present documents in rebuttal.⁶

⁴ The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).)

⁵ District's complaint makes it clear that its entire IEP offer is at issue in this proceeding, unless Student indicates otherwise. The offer includes both a special day class placement and a general education placement for portions of the school day, annual goals, specialized academic instruction, speech and language services, and extended school year services.

⁶ In the future, Student's legal representatives should follow OAH orders and file a prehearing conference statement to assist OAH staff and ALJ's, and opposing parties, to

5. Exhibits: Exhibits shall be pre-marked and placed in a three-ring exhibit binder prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs and accompanied by a detailed exhibit list. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated. Each exhibit binder shall contain a detailed table of contents or list. At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

The law requires each party to serve on the other party copies of their respective exhibits and a list of all witnesses, describing the general area of their testimony, not less than five business days prior to the start of the hearing.⁷ District indicated that this deadline is by the close of business November 4, 2013, following the PHC, and that it had already served its binder on Student.

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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

6. Witnesses: At this time, District intends to call the following witnesses from its PHC statement list of 26 witnesses: Paul Babcock, physical education teacher; Mary Bass, special education local plan area (SELPA) administrator; Scott Berglund, school psychologist; Noelle Golling, general education teacher; Judi Heidebrecht, special education teacher; Tacy Kroell, program specialist; Rob Lowder, general education teacher; Theresa Pafford, program specialist; and Debra Tetz, speech and language pathologist.

At the commencement of the hearing, the ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. 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. Each party shall manage the number of witnesses, if any, so that the party's evidence will be presented within its approximate allocation of fifty

understand their positions, disclose required information, and prepare for hearing. Here, the PHC statement could have stated that Student had no witnesses or exhibits except in rebuttal.

⁷ Education Code section 56505, subdivision (e)(7). The law also provides that the ALJ has discretion to exclude testimony of witnesses or admission of documents that were not disclosed by the parties pursuant to Education Code sections 56505, subdivision (e)(8), and 56505.1, subdivision (f).

percent of the total hearing time. The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary, cumulative, or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

7. 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 requested the telephonic testimony of any witness.

8. Order of Presentation of Evidence: District shall present its evidence first. Where Student and the District intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

9. Closed Hearing: At Student's request, the hearing shall be closed to the public.

10. Motions: Any motion filed after this date 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 this PHC.

11. Special Needs and Accommodations: No special accommodations were requested during the PHC from either party.

12. 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 turned off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

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

14. Settlement: The parties are encouraged to negotiate to reach a settlement 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 during business hours 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. If a settlement agreement has been executed but is subject to approval of a school board, the parties may file a motion for OAH to vacate the hearing dates and set a telephonic status conference for a date following board approval. OAH will check for messages the evening prior to the hearing and the morning of the first day of hearing.

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

Dated: November 4, 2013

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings