

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

LIVE OAK ELEMENTARY SCHOOL
DISTRICT,

OAH CASE NO. 2013090049

LIVE OAK ELEMENTARY SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013060082

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 25, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Theresa Ravandi, Office of Administrative Hearings (OAH). Emily Sugrue, Attorney at Law, appeared on behalf of the Live Oak Elementary School District (District). Parent appeared on behalf of Student. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on December 9 through 12, and December 16 through 17, 2013, and continue day to day, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall begin at 1:30 p.m. on December 9 and 16, 2013, and at 9:00 a.m. all other days, unless otherwise ordered.

The hearing shall take place at the District's offices located at 984-1 Bostwick Lane, Santa Cruz, California 95062.¹

¹At 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.

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 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).) The issues were discussed and clarified during the PHC, and are listed below.²

District Issue: Whether the District’s June 10, 2013 individual education program (IEP) is reasonably calculated to provide Student a free appropriate public education (FAPE)?

Student’s Issues

Issue One: Did the District deny Student a FAPE by inappropriately exiting him from special education at the June 1, 2011 IEP team meeting by:

- a. Failing to appropriately assess Student in all suspected areas of disability including academics, speech and language, cognition, and memory prior to his exit;
- b. Failing to provide Parent sufficient notice of the IEP team meeting and its intent to exit Student;
- c. Failing to arrange with Parent a mutually agreed upon time and place for the IEP team meeting;
- d. Failing to obtain Parent’s informed consent to exit Student from special education including providing her with a copy of the IEP document, assessment reports and notice of her procedural rights; and
- e. Proceeding with the IEP team meeting without Parent and without appointing an educational surrogate?

Issue Two: Did the District fail to fulfill its child find obligations from June 2011 through the current time?

Issue Three: Did the District deny Student a FAPE by not finding him eligible for special education from June 2011 through the current time?

² The parties may further discuss the framing of the issues at the start of the hearing.

Issue Four: Did the District respond appropriately to foster parent's November 19, 2012 request for an independent educational evaluation (IEE)?

Issue Five: Did the District appropriately and timely consider Student's independent assessment from Stanford Lucille Packard Children's Hospital?

Student's Proposed Resolutions: Student requests that the District reinstate and revise Student's IEP and include the recommendations from the independent assessment; identify Student as having a specific learning disability; offer extended school year; implement recommendations of the independent assessment from Lucille Packard; provide the services of an inclusion consultant; reimburse Parent for educational and therapy services; provide compensatory education services; provide Student with therapy by a therapist of parent's choice; appoint an educational surrogate when necessary; consider the input of child's caretakers; train personnel on trauma and loss; and provide Student with accommodations which will allow him to stay in his classroom which is the least restrictive environment.

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. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing, on or before December 2, 2013.³ 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 the ALJ rules that it is admissible.

4. Witnesses. **The parties are ordered to meet and confer by December 2, 2013, to coordinate witness production and schedules.** 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 or during the PHC, except for good cause shown, and at the discretion of the ALJ.

³ Education Code section 56505, subdivision (e)(7).

Student added the following witnesses to his witness list: Thorton Land, Student's first grade teacher; Judith Paton, audiologist; and Lauryn Perez, school psychologist. Student has identified a total of 39 witnesses. The District has identified a total of 18 witnesses. Fourteen witnesses are shared, for a total of 43 witnesses.

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. In light of the fact five days have been scheduled for the hearing in this matter, it would be difficult to complete the hearing as scheduled. **Therefore, by 5:00 p.m. on December 4, 2013, each party shall serve on the other party and on OAH a witness list, including a joint time estimate of the length of each witness's direct and cross examination testimony, and notations as to the witnesses the party intends to call, as opposed to witnesses the party may call, depending on the flow of the hearing and the evidence.**

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss 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.

5. Order of Presentation of Evidence and Scope of Witness Examination. Each party bears the burden of proof as to their issues. The District shall produce its evidence first, followed by Student. Where Student and 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. 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.

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. 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.

Student's motion to allow Rebekah Amador and Dr. Gallagher to testify telephonically is granted. Student's request to allow Dr. Paton to testify telephonically is denied without prejudice. Student may renew his motion with specific information as to why Dr. Paton is unable to appear in person. Student shall provide Ms. Amador and Dr. Gallagher with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing, and work with the District to ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Motions. During the PHC, Student requested permission to audio record the hearing. The District did not object. Both parties are granted permission to privately record the hearing provided they ensure the recordings are turned off every time the ALJ goes off the record. Parties are advised that the only official recording of the hearing is that recorded by the ALJ.

No pretrial motions are pending or contemplated. 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 the prehearing conference of November 25, 2013.

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. Student requested the following accommodations during his testimony: that fewer people be permitted in the hearing room, and that his dependency attorney and therapist be allowed to be present. District objected to the exclusion of any District representative and to the presence of support personnel unless they have concluded their testimony.

Student's dependency attorney and therapist will be authorized to be present during Student's testimony as a silent support. If these individuals are allowed to testify, they will need to testify prior to Student. Student's request that a minimal number of individuals be present during his testimony will be addressed at the time of his testimony.

12. Hearing Closed To the Public. At the request of the Student, 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: November 25, 2013

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings