

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

MT. DIABLO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014050317

ORDER FOLLOWING PREHEARING
CONFERENCE

On June 23, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH). Sheila L. Brogna, Attorney at Law, appeared on behalf of Student. Jan E. Tmsky, Attorney at Law, appeared on behalf of the Mount Diablo Unified School District (Mt. Diablo). 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 at 1936 Carlotta Drive, Special Education Annex, Concord, California 94519, in a room to be designated by Mt. Diablo.¹ It shall take place on July 1, 2014, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On July 1, 2014, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and on the remaining days the hearing shall begin at 9:00 a.m. and end at 5:00 p.m., 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.

¹ At a minimum, the room shall have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for Mt. Diablo's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. Mt. Diablo shall ensure that the hearing room and other facilities that will be used during the hearing comply with the accessibility requirements of the Americans with Disabilities Act.

2. Issues and Proposed Resolutions.

A. Did Mt. Diablo substantively deny Student a free appropriate public education (FAPE) during the 2013-2014 school year by:

1. Failing to provide an educational program in conformity with the June 17, 2013, individualized education program (IEP); and/or
2. Failing to provide a program that enabled Student to make educational progress.

B. Did Mt. Diablo procedurally deny Student a FAPE during the 2013-2014 school year by failing to provide prior written notice of its intent to change Student's placement in June 2013 from Spectrum, a non-public school, to a public LS classroom;

C. Did Mt. Diablo substantively deny Student a FAPE for the 2014-2015 school year by offering a program that:

1. Changed Student's eligibility from Other Health Impaired to Other Health Impaired and Specific Learning Disability;
2. Eliminated individual occupational therapy services;
3. Failed to provide a behavior plan or behavior goals;
4. Failed to provide assistive technology devices and services or goals;
5. Failed to provide speech and language services or goals.

D. Did Mt. Diablo procedurally deny Student FAPE for the 2014-2015 school year by:

1. Failing to assess Student in all areas of suspected disability during its triennial assessment in fall 2014 by failing to administer an evaluation in the area of assistive technology and augmentative/assistive communications;

2. Failing to timely complete an offer of placement and provide it to Parent after the January 14, 2014 IEP team meeting;

3. Failing to provide Parent meaningful participation in the IEP process by

a) Failing to provide Parent with progress notes and homework assignments;

- b) Failing to consider or allow Parent to visit and consider a range of possible placements including in non-public schools;
- c) Cancelling an IEP team meeting on May 2, 2014, because counsel for Student and Parent was present;
- d) Proposing an IEP that was incomplete;
- e) Proposing an IEP that offered two classroom placements that are both inappropriate and do not meet the requirements of the current or the proposed IEP; and
- f) Refusing to propose a continuum of placements for Student.

As resolutions, Student seeks an order that Mt. Diablo provide compensatory services in all areas of need; reimburse Parent for any independent educational evaluations (IEE's) and assistive communications devices they obtained; arrange for Parent to visit the non-public school ANOVA and other possibly appropriate placements; reinstate Student's eligibility as Other Health Impaired and add Nonverbal Learning Disability; and provide assistive communications devices

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 in a way that makes clear the party offering it (such as "S1" or "D2"). 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 on the other party by 5:00 p.m. on June 24, 2014, in compliance with Education Code section 56505, subdivision (e)(7). 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.

a) 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. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses twice or out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement and listed below, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student has identified 15 witnesses to be called at the hearing, and the District has identified 27 witnesses. Some of the witnesses are listed by both parties. In light of the fact that the hearing is estimated to require five days, examination of the number of witnesses proposed would make it difficult to complete the hearing as scheduled. Therefore, at the beginning of the hearing, each party shall serve on the other party and on OAH a tentative witness list, identifying 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. Each revised witness list shall contain an estimate of the length of each witness's direct examination testimony. Prior to the commencement of the due process 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 their testimony.

5. Scope and Order 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once, so the parties shall be required to establish their cases in chief during the first appearance of a witness.

6. Telephonic Testimony. At present no party intends to present a witness by telephone. A party seeking to present a witness by telephone shall move in advance for leave to do so; 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.

7. Electronic Recording of Hearing.

a. Audio Recording. At present no party intends to make an audio recording of the hearing. Any party that desires to make such a recording shall apply for leave to do so in advance from the ALJ and shall do so only on the conditions 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Motions. At present no prehearing motions are pending or contemplated. Any 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 this prehearing conference.

9. 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 shall provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

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

13. Hearing Closed To the Public. At the request of Parents, the hearing will be closed to the public.

14. Settlement. The parties are encouraged to continue their attempts 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. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880. IF A FULL AND FINAL SETTLEMENT 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, AND SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. 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.

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

IT IS SO ORDERED.

Dated: __, 2014

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings