

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

MORGAN HILL UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014040070

ORDER FOLLOWING PREHEARING
CONFERENCE AND GRANTING
CONTINUANCE

On July 21, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Peter Paul Castillo, Office of Administrative Hearings. David Tollner, Attorney at Law, appeared on behalf of Student. Sarah Garcia, Attorney at Law, appeared on behalf of Morgan Hill Unified School District. The PHC was recorded.

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

1. Request for a Continuance and Hearing Dates, Times, and Location. On July 17, 2014, the District filed a request to continue which listed the unavailability of multiple witnesses as grounds for the request. OAH denied the request on July 18, 2014, on the grounds that District failed to establish that Rose DuMond, Director of Student services, among other District witnesses, was not available as she was on vacation through July 30, 2014.¹ The order provided that District could submit another continuance request with specified information, but that the continuance would be for no more than one week.

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. (34 C.F.R. § 300.515(a) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).)

On July 21, 2014, District submitted another continuance, which included a declaration from Ms. DuMond, which established that she had planned the vacation prior to the prior April 29, 2014 continuance order. Accordingly, District has established good cause for a one week continuance of the hearing.

¹ OAH denied the request before it received Student's opposition on July 18, 2014.

The hearing shall take place on August 5, 7, 11, 12, 13, and 14, 2014. The hearing shall begin at 9:00 a.m. and end at 5:00 p.m., except for August 5, 2014, when the hearing shall begin at 9:30 a.m. and August 11, 2014, when the hearing shall begin at 1:30 p.m., unless otherwise ordered. The hearing shall take place at the District's offices, located at 15600 Concord Circle, Morgan Hill, CA 95037.²

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 due process hearing are listed below.

Issue: During the 2013-2014 school year, did District deny Student a free appropriate public education (FAPE) by offering him placement at the Spectrum School, and maintaining his placement there, because of:

- a. Spectrum's inability to implement Student's individualized education program and his regression at Spectrum;
- b. Student's lack of meaningful progress on his goals; and
- c. Spectrum being a physically dangerous environment?

Proposed resolutions: Student requests District funded placement at the Bay School, a certified non-public school, including transportation. Student also requests compensatory education in the areas of speech and language, occupational therapy, applied behavior analysis, behavior supports, adaptive physical education and augmentative and alternative communication for District's failure to provide Student a FAPE from November 1, 2013, through the present.

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

² At a minimum for the hearing, the room shall be accessible and have separate tables capable of being moved into a courtroom configuration, as follows: (1) one table for Student's representatives; (2) one table for the District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. The District shall ensure that all parties and the ALJ have drinking water and tissue available to them.

table of contents. The parties shall serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), by 5:00 p.m. on July 29, 2014. 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.³

The parties are ordered to meet and confer by August 1, 2014, as to the schedule of witnesses, and have agreed to coordinate the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled. By 1:00 p.m. on August 4, 2014, each party shall serve on the other party and on the ALJ, the final witness list, including the anticipated order of the witnesses to be called at the hearing, an estimate of the length of time for the direct examination of each witness the party actually intends to call, along with time estimates for the testimony of any additional witnesses the party may call, depending on the flow of the hearing and the evidence.⁴ 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 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 ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

³ Student indicated that during the PHC that listed experts, Shirit Meggido and Chris Scholer will not be testifying. As to expert Brendan Pratt, Ph.D., Student will provide to District by 5:00 p.m. on July 22, 2014, a copy of his resume and a brief summary of the opinion that Dr. Pratt is expected to give, and a description of the issue to which the testimony of Dr. Pratt relates.

⁴ Parties shall not mail a hard copy of any document to OAH that has already been filed by facsimile transmission.

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. No other 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 July 21, 2014.

8. Recording of Hearing. District's request to audio tape the hearing is granted. The recording by OAH shall be official record of the hearing and no stoppages of the hearing will be granted to accommodate the parties' recording, and parties must cease recording when the ALJ informs the parties that the matter is off the record. Student may also record the hearing subject to the same conditions. Failure to comply will cause the ALJ not to permit the offending party to record the hearing.

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

10. 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.

11. Compensatory Education. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for translation services. District shall ensure that all facilities used during the hearing comply with the Americans with Disabilities Act.

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 business days or fewer 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. 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. The ALJ will check for messages the evening prior to the hearing and 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.

DATE: July 21, 2014

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings