

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL
DISTRICT.

OAH Case No. 2014050996

ORDER FOLLOWING PREHEARING
CONFERENCE

On July 7, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Margaret Broussard, Office of Administrative Hearings. Father appeared on behalf of Student. Rodney Levin, Attorney at Law, appeared on behalf of the Cupertino Union School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place at **Cupertino Union School District, located at 1309 South Mary #250, Sunnyvale, CA 94087.**¹ It shall take place on July 17, 18 and 23, 2014, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On July 17, 2014, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and shall begin at 9:00 a.m. and end at 5:00 p.m. on remaining days, unless otherwise ordered.

The parties shall immediately provide hearing dates to proposed witnesses, and shall subpoena witnesses if necessary, to ensure their availability. Failing to properly notify or subpoena a witness does not constitute good cause for their unavailability. .

2. Issues and Proposed Resolutions. The issues below were discussed at the PHC and reworded for clarity:

¹ At a minimum for the hearing, 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 District's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. District shall provide water and have tissue available for all parties, witnesses, and the ALJ. District shall also ensure that the hearing room and other facilities used during the hearing are accessible.

ISSUE 1: Did Cupertino deny Student a free appropriate public education (FAPE) from March 27, 2014, forward by:

- a) failing to consider the Center for Autism and Related Disorder's (CARD) assessment during the February 25, March 11, and March 27, 2014, individualized education program (IEP) team meetings; and
- b) Predetermining Student's offered 2014-2015 school year placement at Cupertino Middle School at the February 25, March 11 and March 27, 2014, IEP team meetings?

ISSUE 2: Did Cupertino deny Student a FAPE by conducting Student's behavioral assessment between March 4, 2014, and March 11, 2014, without parental consent?

Proposed Resolutions

1) Place Student in a parentally-chosen non-public school specializing in serving children with Autism, and receive the following services, at Cupertino's expense:

- a) One hour speech and language services per week;
- b) One hour occupational therapy services per week;
- c) one-to-one intensive aide services daily in a special day class for 390 minutes per day; and
- d) Round trip transportation.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall number exhibits in a way that clearly identifies the party offering the exhibit (for example "S-1" for Student or "D-1" for District). Each exhibit shall be internally paginated, by exhibit, or all pages of a party's exhibit binder shall be Bates-stamped or otherwise consecutively numbered. 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 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 a written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses.

a) Each party is responsible for procuring their own witnesses; however, the parties shall make witnesses under its control reasonably available to the other party. Witnesses shall be scheduled in a way that avoids delays and minimizes or eliminates having to call a witness twice or out of order. Only witnesses disclosed in a party's prehearing conference statement may testify, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) Student has identified 11 witnesses to be called at hearing. Cupertino has identified 15 witnesses to be called at the hearing. At the beginning of the hearing, each party shall serve on the other party and on OAH a tentative witness list containing the estimated length of the witness' testimony and, 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. Prior to commencing the hearing, the ALJ and the parties will discuss the proposed witness schedule and address scheduling issues for individual witnesses, before the schedule is finalized. The ALJ has discretion to limit the number of witnesses and the length of their testimony.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party shall only question the witness on matters raised in the immediately preceding examination. Parties shall be required to establish their cases in chief (conducting both direct and cross) so that each witness only appears once.

6. Telephonic Testimony. A party must ask in advance if it intends to present a witness via telephone; if granted, the party shall provide the proposed witness with a complete set of exhibit binders from all parties, 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. Neither party requested telephonic testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. At present, both parties intend to make an audio recordings of the hearing. The following conditions apply to any recording: 1) that OAH's recording is the only official recording; 2) that the recorder will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; and 3) the 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. Prior to the beginning of the PHC, Cupertino made a motion to remove ALJ Margaret Broussard for cause because the ALJ had rendered a previous decision

with the same parties that is currently on appeal before the United States District Court. Student opposed the motion. The motion was denied as the pending appeal is does not constitute cause for removal.

At this time, no other 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 and Reimbursement. Any party seeking expense reimbursements shall present admissible evidence of the expense, or a stipulation to the amount, 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 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 any special accommodation for any witness or party.

13. Hearing Open To the Public. The hearing will be open 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 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.

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.

DATE: July 7, 2014

/s/
MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings