

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2014100402

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 27, 2014, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. Lenore A. Silverman, Attorney at Law, appeared on behalf of the San Mateo-Foster City School District. Naum Margovsky, lay advocate, appeared on behalf of Parent and Student.¹ Parent also appeared. The PHC was recorded.

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

1. Motion to Continue. At the start of the PHC, District requested that the hearing be continued one day to November 5, 2014, due to counsel having to appear in federal court on November 4, 2014. Student did not object. This is the initial request for a continuance.

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); 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).) In ruling upon a motion for continuance, OAH is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

¹ Parent indicated during the PHC that she wished for Mr. Morgovsky, a relative, to assist her during the PCH and due process hearing. Parent agreed to file with OAH and serve on District a notice that she is authorizing Mr. Morgovsky to appear on her behalf and on behalf of Student. Parent is to file her notice by October 29, 2014.

District established good cause for a one-day continuance. The hearing will commence on November 5, 2014, at 9:30 a.m.

2. Hearing Dates, Times, and Location. The hearing shall take place at the District offices located at 1170 Chess Drive, Foster City, California 94404, on November 5, 2014, at 9:30 a.m., and November 6, 2014, at 9:00 a.m., continuing day to day, Monday through Thursday as needed at the discretion of the ALJ.² District shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

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.

3. 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.

Issue One: Did District's May 14, 2014 educationally related mental health services assessment meet all legal requirements such that Parent is not entitled to an independent educational evaluation at public expense?

Issue Two: Is District entitled to conduct an updated educationally related mental health services assessment pursuant to its September 2014 assessment plan without conditions imposed by Parent and over Parent's objection?

Issue Three: Is District authorized to send referral packets containing Student's confidential educational information to prospective placements without Parent consent and without Parental edits?

Proposed Resolutions: District seeks an order that: 1) its May 14, 2014 mental health assessment meets all legal requirements such that Parent is not entitled to an independent evaluation; 2) that District may conduct an updated assessment pursuant to the September

² 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. District shall ensure that all parties, witnesses, and the ALJ have drinking water and tissue available to them.

2014 assessment plan without Parent imposed conditions or consent; and 3) that District may send referral packets to prospective placements without Parental edits or consent.

4. 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. The parties were reminded that they must serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), at least five days prior to hearing. District indicated that it would allow Student one extra day, until October 30, 2014, to provide her exhibit binder.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.

5. Subpoenas. Student’s PHC statement requested OAH to issue several subpoenas duces tecum for the production of documents and subpoenas for the appearance of specified witnesses. Student’s request was discussed during the PHC. OAH will issue the following subpoenas and Student is responsible for filling them out, designating the records requested as discussed during the PHC, and serving them. District retains the right to move to quash any subpoenas or ask for other protective relief.

OAH will issue Student one subpoena duces tecum for records of Dr. Pamela Mills. Student’s request for a subpoena duces tecum for records in the custody of San Mateo County Human Services Agency was denied as such records are confidential and subject to release pursuant to specific procedures under Welfare and Institutions Code section 827 et. seq. Student’s request for a subpoena duces tecum requiring District to provide copies of all of Student’s educational records, including emails and other correspondence, was denied as Parent did not establish reasonable necessity, has already requested and received Student’s educational records, and was unable to specify any particular record that was not provided. In addition, District has agreed to provide another hard copy of the educational packet that it had sent to prospective placements. Student withdrew her other requests for subpoenas duces tecum listed in her PHC statement. OAH will issue Student two subpoenas for the appearance of witnesses Jessica Colangelo and Carly Earnshaw at hearing.

³ Student indicated that while she will provide a hard copy of her exhibits to District within legal timeframes, she will not be able to provide her exhibits in a tabbed or numbered format or in a binder until the day of hearing. District retains the right to object to the introduction of documents not properly disclosed at the time of hearing.

6. Witnesses. At the commencement of the hearing, the parties will present their witness schedules, and 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 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 is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. Neither party shall be permitted to call any witnesses not timely disclosed except for good cause shown, and at the discretion of the ALJ.

District intends to call the following witnesses: Parent, John Bartfield, Dr. Pamela Mills, and Griffith Montgomery. Student intends to call the following witnesses: Parent, John Bartfield, Dr. Pamela Mills, Griffith Montgomery, Mr. Morgovsky, and Edgewood staff Jessica Colangelo and Carly Earnshaw

Parties are reminded 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, to ensure that this matter is concluded within the time allotted, based upon the parties' time estimates and the issues presented.

7. Order of Presentation of Evidence and Scope of Witness Examination. District bears the burden of proof and shall present its evidence first, followed by Student. Where District and Student 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.

8. 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. Neither party anticipates the need for telephonic testimony.

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. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, or the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880, as soon as the need is made known. Additional information concerning a request for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

12. Hearing Closed To the Public. At the request of 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.

DATE: October 28, 2014

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings