

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

NOVATO UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014090047

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 10, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Charles Marson, Office of Administrative Hearings. Amanda Metcalf, Attorney at Law, appeared on behalf of Student. There was no appearance on behalf of the Novato Unified School District (Novato).¹ Sarah Garcia, Attorney at Law, appeared on behalf of the Larkspur-Corte Madera School District (Larkspur). Emily Sugrue, Attorney at Law, appeared on behalf of the Reed Union School District (Reed). 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 1015 Seventh Street, Novato, California 94945, in a room to be provided by Novato. It shall take place on November 18, 19, 20, and 24, and continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ. On November 18, 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 school 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

¹ At approximately 1:03 p.m., the ALJ telephoned the office of Dannis Woliver Kelley, which represents Novato, and was told by the operator that Ms. Elizabeth Estes was not available either in the office or by cellphone. The ALJ called back at approximately 1:14 p.m. and was told by the operator that neither Ms. Estes nor Ms. Kimberly Schulist, her co-counsel, was available in the office or by cellphone. After a pause, someone at the law firm terminated the call. At 1:24 p.m., after the PHC had begun, Ms. Schulist called OAH and gave a contact number where she could be reached. At 1:52 p.m., Ms. Schulist called OAH again and stated that she had earlier in the day given the previously assigned judge her contact number for today's PHC. By that time the PHC had concluded.

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.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.

A. From August 27, 2012, to September 22, 2014, did Novato, Larkspur, and/or Reed deny Student a free appropriate public education by failing to comply with their child find obligations: specifically, by failing to assess Student and to determine that she was eligible for special education?

B. From August 27, 2012, to September 22, 2014, did Novato, Larkspur, and/or Reed deny Student a FAPE by failing to offer or provide Student an appropriate individualized education program?

As resolutions, Student seeks 1) reimbursement of Parents for their expenses in providing Student an education, including private academic placement and related necessary and appropriate services; 2) funding of an independent educational assessment and compliance with its findings, determinations, and recommendations; and 3) funding of Student's continuing placement in the Stern School.

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 November 10, 2014, in compliance with Education Code section 56505, subdivision (e)(7). At the PHC Student advised the parties that she would be unable to provide her exhibits and witness lists until November 12, 2014. Novato, Larkspur, and Reed reserve the right to oppose the introduction of any exhibit or the testimony of any witness not disclosed by November 10, 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.

² At a minimum, the hearing 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 each, if possible, for the representatives of Novato, Larkspur, and Reed; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table.

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 18 witnesses, Novato has identified 17 witnesses, Larkspur has identified five witnesses, and Reed has identified eight witnesses to be called at the hearing. Some of the witnesses are listed by both parties. In light of the fact that four days have been scheduled for the hearing, 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. Order of Consideration of Issues. Larkspur and Reed indicated their intention to file motions to bifurcate the hearing so that their liability could be considered first. Student had no opposition to bifurcating the hearing so that their liability could be considered on the first day. The matter is bifurcated so that the first day of hearing will address the liability of Larkspur and Reed, and the ALJ will rule on those issues by the end of the day if possible.

7. Telephonic Testimony. Student's motion to allow Dr. Audrey Bethke to testify by telephone was unopposed and is granted. At present no party intends to present

any other 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.

8. Electronic Recording of Hearing.

a. Audio Recording. Larkspur's motion to record the hearing is granted subject to the conditions below. At present no other 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.

9. Motions. 1) On November 5, 2014, Novato, Larkspur, and Reed moved to continue the hearing. At the PHC Student stated she was not ready to argue the motion orally and wished to file a written opposition by the end of the day. The motion was not ruled on. 2) Larkspur indicated an intention to file a motion to dismiss itself as a party. 3) At present 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.

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

12. 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.

13. Special Needs and Accommodations. At present no party anticipates the need for special accommodation for any witness or party, or for the services of an interpreter. 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, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning requests for reasonable accommodation is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

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

15. 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.

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

IT IS SO ORDERED.

Dated: November 10, 2014

/s/

CHARLES MARSON
Administrative Law Judge
Office of Administrative Hearings