

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH Case No. 2014080454

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

OAKLAND UNIFIED SCHOOL DISTRICT,

OAH Case No. 2014050059

v.

PARENT ON BEHALF OF STUDENT.

ORDER FOLLOWING PREHEARING
CONFERENCE AND ORDER DENYING
STUDENT'S MOTION TO AMEND
COMPLAINT

On January 23, 2015, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. LaJoyce L. Porter, Attorney at Law, appeared on behalf of Parent and Student. Lenore Silverman and Alejandra Leon, Attorneys at Law, appeared on behalf of the Oakland Unified School District (Oakland). John Rusk, Oakland's compliance coordinator also appeared. 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 the Oakland OAH offices located at 1515 Clay Street, Suite 206, Oakland, California 94612, on February 3 through 5, and February 9, 2015, and continue day to day, Monday through Thursday, as needed at the discretion of the ALJ. The hearing shall start at 9:30 a.m. on the first day of hearing, at 1:30 p.m. on February 9, 2015, and at 9:00 a.m. every other day, unless otherwise ordered.¹

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

¹ At the start of the hearing, the ALJ and parties will discuss whether the hearing may begin at 9:30 a.m. on February 9, 2015.

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 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 at the due process hearing were discussed and clarified during the PHC and are listed below.

Student's Issue.

Issue One: Whether Oakland denied Student a free appropriate public education during the 2013-2014 school year by failing to:

- a. Carry out its child find obligation;
- b. Find Student eligible for special education based upon its January 23, 2014 assessment discussed at the April 1, 2014 individualized education program team meeting;
- c. Provide Parent with Student's educational records as requested on March 19, 2014, and April 1, 2014, so that she could participate in the April 1, 2014 IEP team meeting and due process hearing filed by Oakland on April 29, 2014; and
- d. Design a program to meet Student's unique needs.

Proposed Resolutions: Oakland to fund an independent psycho-educational assessment and convene an IEP team meeting within 30 days of receiving the independent evaluation to discuss Student's eligibility and appropriate services; Oakland to provide compensatory education and services based upon the recommendations of the independent assessor, including but not limited to 500 hours of one-to-on academic instruction in all core academics through a nonpublic agency; Oakland to provide Student placement in a nonpublic school or other therapeutic setting or with a program of home instruction pending the independent educational evaluation.

Oakland's Issue.

Issue Two: Whether Oakland's 2014 psycho-educational assessment of Student met all legal requirements such that Parent is not entitled to an independent educational evaluation at public expense?

Proposed Resolution: Oakland seeks an order finding that its 2014 psycho-educational assessment of Student was appropriate such that Parent is not entitled to an independent educational evaluation at public expense.

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 table of contents. The parties stipulate to a late exchange of evidence binders until Thursday, January 29, 2015. 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.

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.

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. Student has listed 17 witnesses and Oakland has listed 11 witnesses, many of whom are shared. Oakland shall inform Student by close of business, January 23, 2015, whether any of the identified Oakland witnesses are no longer employed by Oakland. Oakland is to make best efforts to either provide Student with a last known address as to any identified witnesses who are former Oakland employees, or to make arrangements to accept a subpoena on their behalf in order to expeditiously secure their attendance at hearing.

The parties are ordered to meet and confer by January 29, 2015, as to the schedule of witnesses and projected length of direct and cross-examination. At the start of the hearing, the parties shall present a final, joint schedule of witnesses with time estimates. 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 issue presented.

5. Order of Presentation of Evidence and Scope of Witness Examination. The parties bear their respective burdens of proof as to their issues. Oakland shall present its evidence first, followed by Student. Where Student and Oakland 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.

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. The proponent of the witness shall provide the proposed witness with a complete set of exhibits from both 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. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's motion to allow Dr. Michael Auza, Dr. Carol Glann, and Amy Huerta to testify telephonically was not opposed and was granted. Student's request to provide each telephonic witness with a complete electronic copy of all exhibits, paginated and in the same order as each exhibit binder, was granted over Oakland's objection.² Student shall provide each witness who appears telephonically with a complete electronic copy of each party's exhibits, paginated and in the same order as each exhibit binder, prior to the hearing. OAH shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness.

7. Electronic Recording of Hearing. At present, both parties intend to make an audio recording 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.

8. Motions.

Student's Motion to Amend Complaint: On January 22, 2015, Student filed an Amended Request for Due Process Hearing which includes the issue of a denial of a FAPE for the 2014- 2015 school year, as well as Oakland's failure to comply with the requirements of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11431 et seq.). This filing is treated as a motion to amend the complaint. At the PHC, the parties were given the opportunity to argue their respective positions. Oakland did not oppose Student's request. When presented with the opportunity to brief the issue of how a further delay in this case would be consistent with the speedy mandate of the Individuals with Disabilities Education Act, neither party requested the opportunity to do so.

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C.

² If a telephonic witness takes an undue amount of time to locate referenced pages of exhibits in the electronic file, the ALJ may order that Student provide the witnesses with actual binders of the exhibits to ensure the hearing proceeds in an efficient manner.

§1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).)

Having considered the arguments of counsel and Student's written request to amend, Student's motion to amend was denied. This matter has been pending since April 29, 2014, and a further delay does not comply with the speedy resolution mandate of the IDEA. Student delayed filing his request to amend although he has been aware of the facts in support of his new claims for several months. Granting the request to amend will unduly delay resolution of this matter. Student maintains his right to file a new complaint to address issues for the current school year, although Student is advised that OAH does not have jurisdiction over claims pursuant to the McKinney-Vento Act.³

No further 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 January 23, 2015.

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 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.

12. 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.

³ There is an appeal process when a dispute arises between a school district and parent concerning a homeless student's educational placement. (42 U.S.C. § 11432(g)(3)(E).)

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

14. 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.

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

IT IS SO ORDERED.

DATE: January 23, 2015

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings