

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:
PARENTS ON BEHALF OF STUDENT,

v.

KENTFIELD SCHOOL DISTRICT.
OAH CASE NUMBER 2024070418

ORDER FOLLOWING PREHEARING CONFERENCE ON
REMAND, VACATING HEARING DATES, CONTINUING
MATTER FOR CLOSING BRIEFS, AND GRANTING IN PART
DISTRICT'S MOTION TO SUPPLEMENT THE
ADMINISTRATIVE RECORD

JULY 28, 2024

On July 12, 2024, Student filed a Notice of Remand with the Office of Administrative Hearings, called OAH, with a copy of a June 17, 2024 Order On IDEA Appeal And Summary Judgment Motions issued in Case No. 22-cv-04875-AGT by the United States District Court, Northern District of California. The Order remanded

Student's claim to OAH for further consideration of an issue decided in OAH Case number 2022010393.

Also on July 12, 2024, OAH issued a Scheduling Order setting a prehearing conference for the remanded matter on July 19, 2024, and a due process hearing on July 30 through August 1, 2024.

On July 19, 2024, Administrative Law Judge Robert G. Martin, Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Attorney Damien Troutman appeared on behalf of Student. Attorney David Mishook appeared on behalf of Kentfield School District, referred to as Kentfield. The PHC was recorded. Based upon discussion with the parties, the ALJ issues the following order:

ISSUES

The sole issue at the due process hearing, as directed by the district court's June 17, 2024 Order, and confirmed with the parties at the PHC, is:

1. Based on the administrative record as a whole, was Student eligible for special education in January 2020 under the category of specific learning disability?

The district court directed the ALJ on remand to make this determination without deferring to Kentfield's 2020 eligibility determination.

The court did not direct OAH to determine any proposed resolutions on remand. Accordingly, OAH will not consider any proposed resolutions.

A party believing that an issue has been misstated or improperly omitted shall promptly file a notice in writing, prior to the first day of hearing, stating its concern and referring to supporting portions of the complaint.

ADMINISTRATIVE RECORD ON REMAND

DISTRICT COURT INSTRUCTIONS REGARDING THE ADMINISTRATIVE RECORD

On July 8, 2024, the district court issued an Order on Kentfield's Motion for Clarification that addressed the contents of the administrative record to be reviewed by OAH on remand. The court stated it had previously granted a motion by Student to supplement the administrative record with a report prepared by Dr. James Bylund and a report prepared by Sean McCormick. The court stated those two reports were now part of the administrative record, "and should be considered by the ALJ on remand," with the ALJ to "decide in the first instance what weight to give the reports, if any." The Bylund neuro-educational report was dated November 11, 2022. The report by certified education specialist McCormick was undated, but referred to Student's performance at Redwood High School in fall 2022. Student filed both reports with the district court in January 2023.

The district court also addressed a previously filed motion by Kentfield to supplement the administrative record. The court stated it had not resolved the motion, but had instead invited Kentfield to re-notice its motion, or file an amended notice, when Kentfield moved for summary judgment. The court stated Kentfield had done

neither of those things, so Kentfield's proposed additions were not added to the administrative record. The district court stated that the IDEA claim was now before the ALJ on remand, so Student or Kentfield would need to seek leave from the ALJ to further supplement the administrative record. The court stated it took no position on whether further supplementation of the record would be warranted.

KENTFIELD'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

On July 16, 2024, Kentfield filed with OAH a Motion to Supplement Administrative Record. Kentfield's motion sought to supplement the administrative record with the following eight educational records Kentfield obtained from Tamalpais Union High School District, which Student attended after completing Kentfield's kindergarten through eighth grade program in June 2022:

1. 2021-2022 California Assessment of Performance and Progress ("CAASPP") Smarter Balanced Score Report for Student from Spring 2022 testing in English Language Arts and Mathematics.
2. 2021-2022 CAASPP Lexile and Quantile Measures results for Student from Spring 2022 testing in English Language Arts and Mathematics.
3. Printout from CAASPP website, generated April 28, 2023, explaining CAASPP Lexile and Quantile Measures.
4. November 3, 2022, Psychoeducational Assessment Report for Student prepared by Tamalpais.
5. Student's November 3, 2022, Individualized Educational Program, called an IEP, prepared by Tamalpais.
6. December 8, 2022, input from Student's teachers at Redwood High School.
7. Transcript of Student's grades for the 2022-2023 school year grades as of March 31, 2023.

8. Undated Student Grade Book of Student's grades for 9th grade at Redwood High School.

On July 19, 2024, after the PHC, Student filed an opposition to Kentfield's motion to supplement the administrative record.

The IDEA, Education Code, and Administrative Procedures Act do not address supplementing the administrative record of a due process hearing on remand to the administrative agency. However, the IDEA provides that on appeal of a due process hearing decision, a district court "shall hear additional evidence at the request of the party." (20 U.S.C. § 1415(i)(2)(C)(ii).) The Ninth Circuit has held that additional evidence means evidence that supplements the record from the administrative hearing, including evidence concerning relevant events occurring subsequent to the administrative hearing. (*Ojai Unified School Dist. v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1473 (*Ojai*)). The standard for admitting after-acquired evidence is whether the evidence is relevant, non-cumulative, and otherwise admissible. (*E.M. v. Pajaro Valley Unified School Dist.* (9th Cir. 2011) 652 F.3d 999, 1005-1006 (*Pajaro Valley*)). Relevant evidence includes after-acquired evidence "may shed light" on the objective reasonableness of a school district's actions at the time the school district rendered its decision. (*Id.* at p. 1004, citing *Adams v. Oregon*, (9th Cir.1999), 195 F.3d 1141, 1149.)

The district court has discretion to consider such evidence, weighing heavily the important concerns of not allowing a party to undercut the statutory role of administrative expertise, the unfairness involved in one party's reserving its best evidence for trial, the reason the witness did not testify at the administrative hearing, and the conservation of judicial resources. (*Ojai, supra*, 4 F.3d at 1473.) The district court must also be careful not to allow such evidence to change the character of its hearing from one of review to a trial de novo. (*Ibid.*)

Student did not challenge the authenticity of Kentfield's proposed supplemental exhibits. Student contended that OAH lacks subject matter jurisdiction to hear Kentfield's motion to supplement the administrative record, because the IDEA did not expressly authorize OAH to do so. However, the authority to hear an evidentiary motion in an administrative proceeding is not a question of jurisdiction, and OAH is able to hear and admit supplemental evidence on remand. (See, e.g., *Pajaro Valley, supra*, at p. 1006 [directing district court to consider an assessment of the student "submitted to the OAH after the district court remanded his case"]; *Cupertino Union School District v. K.A.* (N.D. Cal. 2014) 75 F.Supp.3d 1088, 1106–1107 [urging the ALJ on remand to exercise discretion to order a new IEP meeting to develop further evidence on an appropriate remedy].) When special education law does not specifically address an evidentiary motion, such as this motion, or a motion to quash, OAH relies by analogy on the relevant law applicable in district court.

Student also contended that allowing Kentfield to supplement the record would open the door to additional documents to provide context, impermissibly turning this matter into a trial de novo. However, the term "de novo" refers to a standard of judicial review in which the reviewing tribunal gives no deference to the lower tribunal's findings of law, or, in some cases, law and fact. It is not applicable in this remand proceeding, where the district court has found an error of law and directed OAH on remand to reconsider the administrative record's evidence of Student's eligibility, as supplemented, without deferring to Kentfield's determination.

Assuming Student's objection was not to a standard of judicial review, but instead that allowing Kentfield to supplement the administrative record would require an additional hearing, several of Kentfield's proposed supplemental exhibits may be considered without requiring a hearing to give them context. Student's CAASPP scores

from third, fourth and fifth grade are already part of the administrative record in this matter. They provided relevant evidence of Students' academic progress towards mastering the grade-level knowledge and skills specified in California's Common Core State Standards for educational achievement in English Language Arts and Mathematics. As objective test scores, they were readily authenticated during the previous hearing and admitted without requiring lengthy testimony or use of legal or administrative or resources. Student's eighth grade CAASPP scores are similarly relevant. Like their predecessors, they may be added to the administrative record without undue use of resources.

The November 3, 2022 psychoeducational assessment of Student conducted by Tamalpais was prepared at the same time as Dr. Bylund's neuro-educational report. It is presumably similar in nature to Dr. Bylund's report, and may contain information about Student from observation, interviews, standardized testing, and rating scales, as well as analysis by the assessor. The district court directed the ALJ on remand to "decide in the first instance what weight to give the reports, if any." This direction may be applied equally to the Tamalpais psychoeducational assessment report as to the contemporaneous Bylund and McCormick reports. At the PHC, Student did not suggest that testimony or additional documentary evidence was needed to give context to the Bylund and McCormick reports, nor is it necessary for the similar Tamalpais report.

In fact, Student and Kentfield agreed on the record at the PHC that no hearing was necessary either to address Student's supplemental exhibits to the administrative record, or to address any of Kentfield's eight proposed supplemental exhibits if they were added to the administrative record. However, notwithstanding that agreement, the remaining four proposed supplemental exhibits from Student's 2022-2023 school year at Tamalpais – Student's IEP and grades, and teacher input regarding Student, all

involved much more subjective, opinion-based evaluations of Student than his CAASPP results and scores on standardized tests in the Tamalpais psychoeducational assessment. The use of administrative and legal resources to introduce supporting and rebuttal testimony and documents to give context to these proposed supplemental exhibits is not justified, given their attenuated relevance in this matter as information on Student's in-school performance nearly three years after the January 2020 period at issue.

Kentfield's Motion to Supplement the Administrative Record is granted in part. Kentfield will be allowed to supplement the administrative record with the following four documents:

- 2021-2022 California Assessment of Performance and Progress ("CAASPP") Smarter Balanced Score Report for Student from Spring 2022 testing in English Language Arts and Mathematics.
- 2021-2022 CAASPP Lexile and Quantile Measures results for Student from Spring 2022 testing in English Language Arts and Mathematics.
- Printout from CAASPP website, generated April 28, 2023, explaining CAASPP Lexile and Quantile Measures.
- November 3, 2022, Psychoeducational Assessment Report for Student prepared by Tamalpais.

The other documents offered by Kentfield will not be added to the administrative record.

HEARING DATES VACATED

The PHC addressed whether a hearing was necessary in this remand proceeding. Student's PHC statement, filed after Kentfield's motion to supplement the administrative

record, stated, "Given the discrete issue to be decided on remand, Petitioners do not believe that further evidentiary proceedings are necessary or appropriate." District's PHC statement noted the district court had accepted Student's supplemental evidence solely on motion and without testimony and urged OAH to do the same with regard to Kentfield's motion. Following discussion among the ALJ and the parties, all agreed that no hearing would be necessary, regardless of the outcome of Kentfield's motion, and the ALJ vacated the pending hearing dates.

MATTER CONTINUED TO AUGUST 15, 2024 FOR CLOSING BRIEFS

After discussing factual and legal questions relevant to the issue for hearing, the ALJ and parties agreed the matter should be continued for submission of closing briefs.

Based on the discussion with the parties at the PHC, the matter is continued to August 15, 2024 for the parties to submit closing briefs. The closing briefs should include analysis of the burden of proof on the issue for hearing. With respect to after-acquired evidence that may shed light on the reasonableness of Kentfield's January 2020 determination that Student was ineligible for special education, the parties should also include an analysis of the deference, if any, that should apply to Kentfield's decision to use the pattern of strength and weaknesses methodology as part of its evaluation of Student's eligibility under the category of specific learning disability, and the weight that should be given by the ALJ on remand to any subsequent eligibility determinations made using a different methodology, such as the severe discrepancy method.

PARTIES TO USE CASE CENTER FOR EXHIBITS

At the PHC, the parties stated they wished to cite to the administrative record page numbering used by the district court, rather than by the page numbering in the exhibits uploaded to Case Center in the original proceeding, OAH Case number

2022010393. The ALJ agreed to allow parties to electronically file a copy of the district court's administrative record, adding Student's two supplemental exhibits, and any Kentfield supplemental exhibits admitted based on Kentfield's motion to supplement.

However, the ALJ determined after the PHC that Case Center must be used to manage the volume of pages in the administrative record.

The parties are therefore ordered to use Case Center to manage the administrative record in this case, as follows:

- The parties have been given access to OAH Case number 2022010393 in Case Center, and may review and download the exhibits that were admitted or excluded in that matter, and made up the administrative record provided to the district court.
- The parties have also been given access in Case Center to this matter on remand, OAH Case number 2024070418. Sections have been created in Case Center for Student's supplemental exhibits on remand, and for Kentfield's supplemental exhibits on remand. By August 5, 2024, Student must upload Student's two supplemental exhibits to Student's section, and Kentfield must upload its four supplemental exhibits to Kentfield's section.
- Each exhibit must be identified by a letter and number. Student must use the letters SR, for student remand, before the number to identify Student's exhibits. Kentfield must use the letters DR, for district remand, before the number to identify Kentfield's exhibits. A cover sheet with this identifying letter and number should be the first page of each exhibit. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

- In preparing their closing briefs, the parties must refer to the exhibit numbers and page numbers assigned in Case Center for OAH Case numbers 2022010393 and 2024070418.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Robert G. Martin", with a stylized flourish at the end.

Robert G. Martin

Administrative Law Judge

Office of Administrative Hearings