BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE CONSOLIDATED MATTERS OF:

PARENT ON BEHALF OF STUDENT,

v.

PANAMA-BUENA VISTA UNIFIED SCHOOL DISTRICT,

OAH CASE NUMBER 2020090289

and

PANAMA-BUENA VISTA UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020070003

and

PANAMA-BUENA VISTA UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT,

OAH CASE NUMBER 2020100652

ORDER DENYING MOTION TO REOPEN RECORD

JANUARY 22, 2021

Education Code, section 56505, subdivision (e), states that the parties to a due process hearing shall have certain "rights," including, in pertinent part, the "right" to receive from other parties to the hearing, at least five business days before the hearing, a copy of all documents that the parties intend to present at the hearing, and the "right" to prohibit the introduction of any evidence at the hearing that has not been so disclosed. (Ed. Code, § 56505, subds. (e) (7) and (8).) Education Code, section 56505.1, subdivision (f), states that the hearing officer during a hearing "may" (but is arguably not mandated to) bar introduction of any documents not so disclosed. (Ed. Code, § 56505.1, subd. (f).)

By Order dated December 28, 2020, the parties were ordered to serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). That Order stated that except for "good cause shown," or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by the Education Code shall not be admitted into evidence at the hearing unless the administrative law judge, or ALJ, rules that it is admissible.

Here, with the exception of a single document at issue in this Motion, the parties timely exchanged their exhibits. The hearing, which is still ongoing, proceeded on January 5, 6, 7, 12, 13, 14 and 19 before the issue arose that is the subject of this Order. By the end of the January 19, or seventh hearing day, nine witnesses had testified and been excused, and a tenth witness's testimony had begun.

At the conclusion of the hearing day on January 19, 2021, District sought to reopen the record to allow a new document to be exchanged. The ALJ took oral argument and permitted written briefs. On January 20, 2021 District filed a formal motion to reopen the record.

District's motion states that District staff first discovered the document on January 11. District's counsel first learned of the document sometime during the week of January 12, 2021, and provided it to Student's counsel on January 16, 2021. District argues that there is "no prejudice" to the late admission of this document, and "no legal basis" for the ALJ to deny the Motion.

On January 21, 2021, Student opposed. The motion is now denied, for the following reasons.

First, the ALJ rejects the argument that there is "no legal basis" to deny the motion and exclude the document. The authorities cited above clearly provide for Student's "right" to have received the document timely, and to prohibit its introduction, and for the ALJ's authority to so order.

Secondly, the ALJ rejects the argument that the late introduction would create "no prejudice." Although, as District argues, the witness whose testimony most relates to the missing document may have not yet testified, nine witnesses had been excused before District raised this request. Student might now need to completely re-group,

re-call witnesses who have already been excused, prepare expert witnesses anew, and request to schedule additional days in this matter which had already expended seven hearing days by the time the document was brought to the ALJ's attention.

There is no doubt that the missing document would be potentially relevant and probative to District's and potentially Student's cases in chief. In this consolidated matter, one of District's issues is whether its individualized education plan, or IEP, offer dated December 19, 2019 as amended February 28, 2020, was necessary to provide Student a free appropriate public education, or FAPE, in the least restrictive environment such that it may be implemented without parental consent. District's burden of proof includes establishing the contents of the IEP's, including in pertinent part the goals that were proposed. The document that has already been admitted into the record as the February 28, 2020 IEP, Exhibit 53, contains no goals. Goals could potentially be inferred or extrapolated from other documents, from the IEP Notes referencing them, or from testimony, but the IEP goals pages themselves are indisputably not contained within Exhibit 53. The new document District seeks to now have marked and potentially admitted purports to be the goals pages themselves from the February 28, 2020 IEP.

Although potentially relevant and probative, the missing document was admittedly not timely exchanged although it was or should have been in District's control. No "good cause" has been stated to deviate from the procedural rules regarding timely exchange, which allow parties to understand before the hearing what the documentary evidence will be, prepare themselves for hearing, garner their own testimony and in some cases including this one, prepare experts to give opinion testimony. The procedural rules prevent surprise, and do not depend on the relevance or probativeness of the missing late-discovered evidence.

When District originally brought this matter seeking to establish that its IEP's were necessary to provide FAPE, it must have known that the February 28, 2020 IEP document now admitted as Exhibit 53 did not contain any pages of goals, and it must have determined that it could prove its case without them. Thus, District is not prejudiced, in its case presentation, by this ruling. The motion is denied.

IT IS SO ORDERED.

June Lehrman
June Lehrman (Jan 22, 2021 12:59 PST)

June Lehrman
Administrative Law Judge
Office of Administrative Hearings