BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. CUPERTINO UNION SCHOOL DISTRICT,	OAH CASE NO. 2013030785
PARENT ON BEHALF OF STUDENT, v. CUPERTINO UNION SCHOOL DISTRICT,	OAH CASE NO. 2013040122 ORDER FOLLOWING PREHEARING CONFERENCE

On May 20, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH). Student's father appeared on behalf of Student. Rod Levin, Attorney at Law, appeared on behalf of Cupertino Union School District (District). The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on May 29-31, 2013, and continuing day to day, Monday through Thursday as needed at the discretion of the ALJ.[1] The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m. with the exception of the first day of hearing, on which day the hearing shall begin at 9:30 a.m. The hearing shall take place at the District's offices located at 1309 South Mary, #250, Sunnyvale, California 94087.

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.

[1] OAH does not schedule hearings on Fridays, although an individual ALJ has authority to do so. Should another ALJ be assigned to hear this matter, that ALJ may choose not to have the hearing go forward on May 31, 2013, and may continue the hearing to another date.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.[2]

a) Whether the District denied Student a free appropriate public education (FAPE) when it unilaterally predetermined his individualized education program (IEP) in an IEP offer dated March 29, 2012?

b) Did the District deny Student a free appropriate public education (FAPE) at an IEP team meeting on May 31, 2012, by denying Parents' request for home-hospital instruction because of Student's medication?

c) Did the District deny Student a FAPE for the 2012-2013 school year by not providing him with home-hospital instruction and related services following an August 29, 2012 agreement, that it would do so?

Proposed resolutions:

a) Student shall be placed in a nonpublic autism agency chosen by Parents, including transportation at the District's expense.

b) Parents shall be reimbursed for the costs of an alternative program they arranged for Student which began March 29, 2012. The alternative program consists of 100 hours per month of one-to-one applied behavior analysis.[3]

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, or otherwise consecutively numbered. Each exhibit binder shall contain a detailed table of contents. The parties represented that they will serve their evidence binders on each other in compliance with Education Code section 56505, subdivision (e)(7), exchanging the binders at the District's attorney's office on May 22, 2013.

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[2] The issues have been very slightly reworded from the language used at the PHC, but none of these changes are substantive.

[3] The ALJ informed Father that she does not have authority to award monetary damages, or to order the District to reimburse Parents for any costs they incur in taking this case to hearing, including lost wages. Therefore, these proposed resolutions are not listed above. The proposed resolutions that are listed were paraphrased from Father's PHC statement.

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 it is supported by a written declaration under penalty of perjury, and the ALJ rules that it is admissible. Inclusion of a document in an evidence binder is not a guarantee that it will be admitted.

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. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement, during the PHC, or in writing except for good cause shown, supported by a written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by close of business May 24, 2013, as to the schedule of witnesses and the availability and order of testimony of witnesses to ensure that there is a witness available to testify at all times during the hearing, and to ensure that the hearing is completed as scheduled.

The following witnesses will be called to testify by Student: Mother, Cynthia Valle, Vincent L Redmond, Damon Korb, M.D., Todd Lewis, M.D., Jennifer Keicher, Shelly Ota, Lynn Membreno, Smita Chandru, Shonia Porter, Zack Buffum, Rosemary Berwald, and Vicky Broumas.

The District listed 34 potential witnesses in its PHC statement. However, it will be significantly reducing the number of witnesses it intends to call, and will provide the ALJ with that list at the commencement of the due process hearing.

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.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and 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 witnesses' testimony. Inclusion on a witness list is not a guarantee that the ALJ will permit a witness to testify.

5. Scope 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.

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. Good cause must be shown as to why the witness must testify telephonically. 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.

7. Order of Presentation of Evidence. Student shall present his case first, although the ALJ may hear testimony of a witness for either party out of order if there are scheduling issues. It is expected that a witness will only appear once.

8. Motions. No 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 May 20, 2013.

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 during the hearing unless permission to the contrary is obtained from the ALJ.

11. Electronic Recording of Hearing. Father asked to be allowed to audio record both the PHC and the hearing, and this request was granted. 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 the ALJ does, 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.

12. Compensatory Education/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.

13. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

14. Hearing Open/Closed To the Public. The hearing will be closed to the public.

15. 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.

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

IT IS SO ORDERED.

Dated: May 20, 2013

/s/
REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings