

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2010080478

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

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OAKLAND UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2011051152

v.

PARENT ON BEHALF OF STUDENT.

ORDER GRANTING REQUEST FOR  
CONTINUANCE AND SETTING  
PREHEARING CONFERENCE AND  
HEARING

A due process hearing began on July 26, 2011, concerning the above consolidated matters. The undersigned Administrative Law Judge (ALJ), Rebecca Freie, presided over this hearing. On July 27, 2011, Oakland Unified School District (District) made an oral request for a continuance of this matter. Student's representatives did not object to this request.

APPLICABLE LAW

A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted. (34 C.F.R. § 300.515(a); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3).) Speedy resolution of the due process hearing is mandated by law and continuance of the hearing may be granted only upon a showing of good cause. (Ed. Code, § 56505, subd. (f)(3).) In ruling upon a motion for continuance, the Office of Administrative Hearings (OAH) is guided by the provisions found within the Administrative Procedure Act and the California Rules of Court that concern motions to continue. (Cal. Code Regs., tit. 1, § 1020; Cal. Rules of Court, rule 3.1332.) Generally, continuances of matters are disfavored. (Cal. Rules of Court, rule 3.1332(c).)

Section 56505, subdivision (e)(7) of the Education Code requires the parties to exchange exhibits at least five business days prior to the hearing, and to provide each other with a list of witnesses the party intends to call, with a brief statement of the area of

testimony for each proposed witness. The ALJ conducting a due process hearing may prohibit the introduction of exhibits that were not timely provided to an opposing party, and the testimony of witnesses whose identity was not timely provided to the opposing party. (Ed. Code, § 56505, subd. (e)(8).)

## BACKGROUND

Student's request for a due process hearing (complaint) was filed on August 9, 2010. At that time Student was represented by legal counsel. In November 2010, Student's attorney withdrew from the case, and Student was then represented by an advocate, Elizabeth Celestre (Advocate).<sup>1</sup>

The parties engaged in lengthy mediations conducted by other OAH ALJs from November 2010, through mid-July 2011, as well as other settlement negotiations without the assistance of OAH mediators.<sup>2</sup> John Rusk, the District's Compliance Officer for the Special Education Division represented the District until May, 2011, at which time, Lenore Silverman, Attorney at Law, was retained by the District.<sup>3</sup> The due process hearing began at 1:30 p.m. on July 26, 2011.<sup>4</sup> Prior to that time, the District representatives and the Advocate

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<sup>1</sup> The Individuals with Disabilities Education Act (IDEA) permits nonlawyers to file complaints on behalf of Students and school districts, and to represent their clients in mediations, settlement negotiations, and due process hearings. (20 U.S.C. § 1415, subd. (h).) In California, there are no regulations or statutes that mandate legal requirements for these representatives.

<sup>2</sup> Mediations and settlement negotiations are confidential proceedings. (Cal. Code Regs., tit. 5, § 3086, subd. (b).) The ALJ conducting this due process hearing has redacted information from pleadings submitted by both parties to OAH, as well as striking pleadings that referred to these settlement negotiations. She has cautioned the parties repeatedly throughout the hearing to refrain from mentioning these negotiations, and other than granting requests for continuances in which settlement negotiations were used as grounds for the request, and reviewing pleadings that were subsequently redacted or stricken, is unaware of what has transpired during these negotiations.

<sup>3</sup> Ms. Silverman is lead counsel for the District. She is assisted at hearing by Melanie Seymour, Attorney at Law.

<sup>4</sup> The due process hearing was scheduled to begin at 9:30 a.m. on July 26, 2011, but only Student's mother (Mother) was present; the Advocate was absent. When contacted, via speakerphone, on the record, the Advocate said that she had been told by Father the evening before that the matter was settling and there was no need to appear. Mother stated that she still wanted Student to be represented by the Advocate. The Advocate was ordered to appear at 1:30 p.m.

had repeatedly informed OAH that they were close to settling the case, including the day prior to hearing, July 25, 2011.

The ALJ conducted a prehearing conference (PHC) on June 1, 2011, in which she urged the Advocate to review the “User’s Guide” that is available on the OAH website, and provides parties to due process matters with extensive guidance about California’s due process requirements. She did so because it appeared that the Advocate was unfamiliar with due process procedures. At the due process hearing conducted on July 26 and 27, 2011, the Advocate admitted that she had not previously represented students in proceedings that were the result of due process complaints.

A second PHC was held on July 18, 2011. The Advocate and Ms. Silverman appeared. The parties were ordered to exchange evidence binders no later than close of business on July 19, 2011, and the written order issued the same day repeated that order.<sup>5</sup> When the due process hearing began, Advocate and Ms. Silverman informed the ALJ that they had not exchanged exhibits. The Advocate stated that she had no intention of calling any witnesses, or introducing any exhibits, and she had informed the District’s attorney of that fact several times.

The ALJ then informed Mother and the Advocate, on the record, that they could not prevail in this matter if they presented no evidence, requested the parties present opening statements, and suggested that Mother could testify, and her testimony constituted evidence. The Advocate began with her opening statement, but was unable to refrain from discussing settlement negotiations.<sup>6</sup> Mother then assumed the duty of presenting the opening statement on behalf of Student, and did well.<sup>7</sup> Ms. Silverman then gave her opening statement.

The ALJ then intended to call for the afternoon recess, and instructed Mother and her advocate to prepare a direct examination for Mother during the recess, at which time the Advocate stated that her medical issues would not permit her to proceed further in the matter that date. The hearing was recessed until the following day, and the Advocate was instructed that the hearing would proceed the following day without her if she was unable to appear, unless the ALJ was presented with a written medical excuse from a treating physician.

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<sup>5</sup> Although that order was not formally served by OAH on the advocate until it was delivered via overnight delivery on July 19, 2011, it was, as a courtesy, delivered to the Advocate by email on July 18, 2011.

<sup>6</sup> The Advocate informed the ALJ, on the record, that she had taken medication that caused her to “ramble.”

<sup>7</sup> Because she was a potential witness, Mother was administered the oath prior to beginning the opening statement.

The second day of hearing began at 10:00 a.m. on July 27, 2011.<sup>8</sup> The ALJ again explained to Mother and the Advocate, that their failure to present evidence, via documents and testimony seriously compromised Student's case, because the ALJ would have no legally established facts on which to base a decision. Mother stated that she had brought documents with her that she intended to introduce, and Ms. Silverman stated that she might not object to the introduction of those documents if she had an opportunity to review them. A recess of at least one hour was granted to permit the parties to confer so they could stipulate to the presentation certain documents. During this time, Student's uncle (Uncle) came to the hearing room to assist Mother and the Advocate.

When the hearing resumed, at 11:30 a.m., Mother, Uncle and the Advocate had assembled documents that the District indicated they had no objection to admitting. However, other documents that Mother had brought to the hearing had missing pages, most importantly, the individualized education programs (IEPs) for the 2008-2009, and 2009-2010 school years that are at issue in Student's complaint. The Advocate stated that she had those complete IEPs, but would be unable to obtain them during a noonday recess due to her health issues. When questioned, Ms. Silverman stated that she had those IEPs with her and was ordered to provide them.

The ALJ then ordered Student's representatives to prepare direct examination questions for Mother during a lunch recess. Mother stated that she wanted to have the Advocate and Uncle testify at the hearing, but they had not been listed as witnesses on the prior PHC statement that the Advocate had filed with OAH, and was used for all of the PHCs conducted after mid-May 2011. Student's representatives were then ordered to prepare an offer of proof that they would present, after Mother's testimony, to support their request to have these witnesses testify, notwithstanding the failure to list them as witnesses in the PHC statement that the Advocate had filed on Student's behalf.

When the parties returned from the lunch recess, Ms. Silverman requested a continuance, stating that she was not prepared to address the issue of witnesses who had not been listed on Student's PHC statement, and whose identities had not been disclosed to the District until that morning.

## DISCUSSION

The purpose of the IDEA is to ensure that children with disabilities receive a free appropriate public education (FAPE), and to provide them with certain procedural rights, including several means of resolving disputes with their school districts. The parties to a

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<sup>8</sup> The hearing was scheduled to begin at 9:00 a.m. The District's attorneys were ready to proceed at that time, and Mr. Rusk and the Advocate arrived shortly thereafter. However, Mother called OAH shortly before 9:00 a.m., and informed OAH staff that she had car trouble and would not arrive until 10:00 a.m.

dispute are not excused from preparing for a due process hearing because they are in settlement negotiations. As the hearing proceeded on July 26 and 27, 2011, the ALJ became increasingly concerned that the actions of the parties, including the failure to exchange exhibit binders, and the Advocate's stated intention of not presenting any evidence, were significantly impeding the ALJ's ability to conduct a meaningful due process hearing that would result in a "written, reasoned decision." (Ed. Code § 56505, subd. (f)(3).) Although it is highly unusual to continue a due process hearing that has begun, and failure of the parties to prepare for hearing does not constitute good cause, it became apparent that Student was the ultimate victim of the poorly conceived tactics of the Advocate and the District, and that constitutes good cause. Accordingly, a continuance was granted. The parties shall comply with the following orders (most of which were stated on the record on July 27, 2011) to ensure that the parties' rights to fair and impartial proceedings are not violated.

### ORDERS

1. The due process hearing in this matter is continued to August 15, 2011, at 9:30 a.m., with additional hearing dates of August 16 and 17, 2011, should they be necessary. **NO FURTHER CONTINUANCES SHALL BE GRANTED.**

2. A telephonic PHC shall be held at 1:30 p.m., on August 10, 2011. However, the issues, as stated in the PHC order of July 25, 2011, shall remain unchanged, unless the parties stipulate to change them.<sup>9</sup> The primary purpose of the PHC is to establish an order and schedule of witnesses for the continued due process hearing, and to determine the length of time for each witness's testimony. Parties will be expected to adhere to these timelines when the hearing resumes. Parties may request subpoenas from OAH.

3. The parties shall exchange exhibit binders no later than close of business on August 8, 2011, at the offices of Ms. Silverman. Inclusion of an exhibit in the binder does not guarantee its admission at hearing. At hearing, if a party asks to introduce into evidence a document that was not included in either exhibit binder, the party must be prepared to explain why it should nevertheless be admitted. The parties shall also prepare two additional exhibit binders and bring them to the hearing. One binder is for the ALJ, and the other for witnesses to use when testifying.<sup>10</sup>

4. The parties shall file PHC statements with OAH no later than close of business on August 5, 2011, and shall concurrently provide a copy of the PHC statement to the opposing party. PHC statements shall contain a complete list of the witnesses each party

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<sup>9</sup> Ed. Code § 56502, subd. (i).

<sup>10</sup> The parties may refer to OAH's Guide to Understanding Special Education Due Process Hearings for additional information which can be found on the OAH website at <http://www.documents.dgs.ca.gov/oah/SE>.

intends to call, and a statement as to what the witness shall testify. Only relevant evidence will be admitted.<sup>11</sup>

5. The parties will not be permitted to make opening statements when the hearing resumes on August 15, 2011, as they have already made those statements.

6. Failure to comply with these orders may result in the ALJ ordering the parties to pay reasonable expenses of the opposing party, and/or OAH pursuant to section 3088, subdivision (e), of title 5 of the California Code of Regulations.

IT IS SO ORDERED.

Dated: July 29, 2011

/s/

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REBECCA FREIE  
Administrative Law Judge  
Office of Administrative Hearings

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<sup>11</sup> At hearing, the Advocate asked whether the ALJ would permit the introduction of assessments of Student that were conducted after his due process complaint was filed. *Adams v. Oregon*, (9th Cir. 1993) 195 F.3d 1141, 1149, requires the “actions” of a school district to “be judged as a snapshot” of what was occurring at the time of the action. In this due process hearing pursuant to the IDEA, it is unlikely that assessments conducted after the due process complaint was filed would be relevant to the issue that Student was denied a FAPE for both the 2008-2009 and 2009-2010 school years. The IDEA and case law permit a federal or state judge who conducts a judicial review of an ALJ’s decision to consider “additional evidence. . .concerning relevant events occurring subsequent to the administrative hearing.” (20 U.S.C. § 1415(i)(2)(c)(ii); *Pajaro Valley Unified School District v. Office of Administrative Hearings* (9th Cir. 2011) --- F.3d ---, 2011 WL 2714168; *Ojai Unified Sch. Dist v. Jackson* (9th Cir. 1993) 4 F.3d 1467, 1473.) However, this does not provide an ALJ conducting a due process hearing with authority to admit evidence of recent assessments. Student must be prepared to establish the relevancy of these assessments to the issues being heard.