

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

VENTURA UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011080552

ORDER DENYING STUDENT'S  
MOTION TO ALLOW CORRECTION  
OF CLERICAL ERROR AND  
ADMITTANCE OF DOCUMENTARY  
EVIDENCE (RTC FINANCIAL  
RECORDS)

Parents, on behalf of Student, filed a request for due process (complaint), through their counsel Andrea Marcus, on August 15, 2011, naming Ventura Unified School District (District) as respondent. The complaint listed four issues, one of which was whether Parents were entitled to reimbursement from the District for their costs in unilaterally placing Student at a residential treatment center (RTC) in Utah, called Logan River Academy (LRA). One of the proposed remedies was reimbursement for the LRA costs.

On October 12, 2011, a prehearing conference (PHC) was held before Administrative Law Judge (ALJ), Carla L. Garret. Attorney Marcus appeared on behalf of Student and attorney Melissa Hatch appeared on behalf of District. Judge Garret thereafter issued an Order Following Pre-Hearing Conference, which affirmed that reimbursement of the LRA costs to parents by District was both an issue and requested remedy in Student's due process. The PHC Order further stated at paragraph 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. . .

On October 25, 2011, ALJ Garret granted Student's request to file an amended complaint. Student's amended complaint again alleged that Parents were entitled to reimbursement for the LRA placement costs. OAH issued a new scheduling order; parties requested and were granted a subsequent continuance. The PHC on the amended complaint was held on January 23, 2012, before ALJ Clifford H. Woosley. Ms. Marcus and Ms Hatch telephonically appeared on behalf of the parties. The PHC was recorded.

During the PHC, ALJ Woosley specifically reminded Ms. Marcus that Student was required to include all necessary admissible evidence to support his reimbursement claims. ALJ Woosley cautioned that, while his instruction may have seemed "elementary," he had seen parties fail to include admissible evidence, or any documentary evidence at all, to

support a reimbursement claim. Therefore, he determined that an oral reminder during the PHC was prudent.

The parties acknowledged that the seven-day hearing was scheduled for February 6, 7, 8, 9, 14, 15, and 16, 2012. The parties agreed that the final date for the parties to exchange documentary evidence, pursuant to Education Code section 56505, subdivision (e)(7), was January 30, 2012. Thereafter, ALJ Woosley issued a PHC order, which stated at paragraph 3:

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 written declaration under penalty of perjury, and the ALJ rules that it is admissible.

The PHC order affirmed that the parties acknowledged that January 30, 2012 was the statutory date by which the parties were required to exchange documentary evidence to be introduced at the hearing. Finally, the PHC order included the same paragraph 12 contained in the prior PHC order, stating that “[a]ny 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.”

The hearing commenced on February 6, 2012, before ALJ Woosley, with Ms. Marcus and Ms. Hatch appearing on behalf of the parties. Before any witness testimony, Ms Hatch lodged an objection by the District of Ms. Marcus’ scheduling of witnesses on behalf of Student. Ms. Hatch stated that Ms. Marcus had schedule the Student’s Parents, both Mother and Father, as the last two of more than 20 witnesses. Ms. Hatch argued that Parents will be present throughout the hearing and, therefore, be informed regarding other witness’ testimony. Also, District was denied an opportunity of knowing the Parents’ asserted facts in time to allow District to make appropriate inquiry of other witnesses. District asked that the ALJ order Student to produce Parents for testimony earlier in the proceedings.

ALJ Woosley denied District’s request, noting that the Student bore the burden of proof in presenting his case. In so doing, Student was entitled to present testimonial evidence at a time and manner of his choosing, as long as there was a witness always available to testify. Ms. Marcus chose the litigation strategy of having Father and Mother testify last.

Counsel affirmed that they had timely exchanged the parties’ proposed exhibits. Each party provided a copy of its Exhibits binder to the ALJ and an additional copy for the witness table. Student’s Exhibit binder contained 58 proposed exhibits. The index thereto identifies Exhibit 50 as “All Expenses” for 2009 through 2012, page numbers 417 to 473 (36 pages).

Testimony commenced. At the conclusion of the fourth day, ALJ Woosley continued the matter to Tuesday, February 14, 2012. During the second week of hearing, Student requested additional hearing time. ALJ Woosley granted Student's request and ordered an additional, eighth day of hearing for Friday, February 17, 2012.

At about 4:15 p.m., February 16, 2012, (seventh day of hearing), Ms. Marcus called Father to the witness stand. At about 4:40 p.m., Ms. Marcus referred Father to Student's Exhibit 50 and started to ask questions concerning some of the documents. Student never previously referred to Exhibit 50. Father stated that Exhibit 50 was all the bills and financial documents for expenses relevant to Student's care for which Parents sought reimbursement. Father's testimony soon revealed that he was probably not the parent who was best acquainted with the financial documents.

ALJ Woosley stated he did not want to see Father struggle with the Exhibit 50 documents and suggested that the hearing stop for the day and recommence the next morning, the last day of hearing. ALJ Woosley twice stated that Ms. Marcus should have the Parents review the Exhibit 50 documents that Thursday evening. The ALJ also suggested how Father or Mother might testify to efficiently provide foundation for admission of the Exhibit 50 documents.

On Friday morning, February 17, 2012, Father continued with his testimony. Ms. Marcus did not ask Father any more questions regarding Exhibit 50, stating that Mother would review the financial documents in her testimony. Father concluded at 1:30 p.m. After a short lunch, the hearing recommenced at 2:00 p.m., with Ms. Marcus calling Mother to testify. At 4:10 p.m., Ms. Marcus referred Mother to Exhibit 50. After some uncertainty regarding how to best review the documents, ALJ Woosley walked through every invoice contained in Exhibit 50, eliciting testimony as to what they were for, and hearing District objections regarding a bill's admission.

Exhibit 50 did not contain any invoices, or corresponding proofs of payment, for expenses billed by the RTC, Logan River Academy. Ms. Marcus realized this, for the first time, stating that Exhibit 50 should have included the LRA invoices. Ms. Marcus made an oral motion to introduce the LRA invoices and proofs of payment, stating that her assistant failed to include them. District objected. ALJ Woosley referred Ms. Marcus to the PHC order, noting that Student would have to make a written motion, supported by declaration, showing good cause for the late admission of documentary evidence. At the conclusion of the hearing, ALJ Woosley provided a briefing schedule for the motion and opposition.

On February 24, 2012, Student filed a motion to correct a clerical error, seeking an order admitting the invoices and proofs of payment for LRA. The motion is supported by Exhibits: A (spreadsheet summary), B (LRA Contract), C (primarily LRA therapy invoices and some proofs of payment by a health carrier), D (LRA statements and proof of Parents' payment), E (Declaration of Andrea Marcus), F (a "release," signed by parents, authorizing contact with LRA regarding exhibits B, C, and D) and G (various e-mails between Parents and Ms. Marcus offices about LRA invoices and payment). Ms. Marcus declares that

Parents provided the LRA invoices and proofs of payment to her offices, but that her assistant failed to include them in Exhibit 50 when preparing the Exhibit binders for exchange and hearing. Ms Marcus admits to not noticing the documents' absence. Student now asks that his motion's Exhibits A, B, C and D (totaling 40 pages) be admitted.

District filed opposition on March 1, 2012, stating that Student has failed to provide a basis for a finding of good cause and that the exhibits' admission would be prejudicial to District.

#### ANALYSIS

Education Code section 56505, subdivision (e), states that a party is afforded the following rights consistent with state and federal statutes and regulations:

- (2) The right to present evidence, written arguments, and oral arguments.
- (3) The right to confront, cross-examine, and compel the attendance of, witnesses.
- ...
- (7) The right to receive from other parties to the hearing, at least five business days prior to the hearing, a copy of all documents and a list of all witnesses and their general area of testimony that the parties intend to present at the hearing. . .
- (8) The right pursuant to Section 300.512(a)(3) of Title 34 of the Code of Federal Regulations, to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing.

Education Codes section 56505.1 states that the hearing officer may do the following during the hearing:

- (f) Bar introduction of any documents or the testimony of any witnesses not disclosed to the hearing officer at least five business days prior to the hearing and bar introduction of any documents or the testimony of any witnesses at the hearing without the consent of the other party not disclosed to the parties at least five business days prior to the hearing pursuant to paragraph (7) of subdivision (e) of Section 56505.

Student contends that the failure to include the LRA invoices and proofs of payment in the exhibits was a clerical error. Student contends that the import of the documents outweighs any possible prejudice to the District from counsel's error. The District asserts that it would be substantially prejudiced by the admission of the exhibits, having been denied the opportunity to call or examine witnesses relevant to the LRA billings, as well as what invoices were paid by Student's insurance carrier. District also contends that Student has failed to demonstrate good cause.

Student has failed to demonstrate good cause for the late admission of LRA invoices and proofs of payment, which seek thousands of dollars in reimbursement from the District. The history of this due process action establishes that Student's counsel was given ample notice, both orally by the ALJ and in the PHC orders, to be sure to include any and all documents which support the Parents' reimbursement claims. Student's counsel chose to assign the task of assembling the exhibit binder to an assistant. Yet, as Student's counsel acknowledges, she was responsible for assuring the exhibits were included and exchanged.

The failure to exercise due care in assembling and exchanging the exhibits is further demonstrated by Student's choice to present the financial exhibits in the waning hours of the eighth and final day of hearing, through the last and twenty-fourth witness. By so doing, Student denied himself any opportunity to timely address possible mistakes regarding the financial exhibits. Further demonstrating the lack of diligence and care is the failure of counsel and the Parents to review the financial documents at the conclusion of the hearing's day seven. The ALJ twice stated that the parents should review Exhibit 50, before further testimony the next day, so the exhibits could be efficiently and knowledgeably introduced. Yet, the Parents and Student's counsel were surprised to discover during the testimony of Mother that the LRA invoices and exhibits were absent, demonstrating that they had not heeded the ALJ's request to review the documents.

Student argues that these documents are fundamental to Student proving up his case. Yet, that is exactly the reason why they were required to be disclosed by law five days prior to hearing and why Student has failed to establish good cause. Since these invoices and proofs of payment were so significant, Student's counsel and Parents should have employed extra care to assure their assemblage, exchange and admission. Instead of care, the record indicates carelessness.

The lack of good cause is highlighted by the prejudice to District should the documentation now be admitted, after the hearing is concluded and the witnesses have all been excused. The proposed exhibits raise questions and issues – such as health insurance coverage payments and the breakdown of expenses – which District was entitled to explore with witnesses under penalty of perjury.

The Student has failed to demonstrate good cause for the late admission of the LRA financial documents. The motion is denied.

ORDER

The Student's Motion to Allow Correction of Clerical Error, and Admittance of Documentary Evidence, is denied.

Dated: March 02, 2012

/s/

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CLIFFORD H WOOSLEY  
Administrative Law Judge  
Office of Administrative Hearings