

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

RIPON UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2009070939

ORDER FOLLOWING PREHEARING  
CONFERENCE

On Monday, October 19, 2009, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Trina A. Hirsig, Office of Administrative Hearings, (OAH).<sup>1</sup> Justin Arnold, Attorney at Law, appeared on behalf of Student. Also present with Student's attorney was a paralegal who observed the PHC. Peter W. Sturges, Attorney at Law, appeared on behalf of 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 is continued on motion of Student and shall take place over five days on **November 2, 3, 4, 5, and 10, 2009**. 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.**, unless otherwise ordered, at:

San Joaquin County Office of Education Building  
**2901 Arch Airport Road**  
**Stockton, California. 95206.**

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.

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<sup>1</sup> OAH ALJ Deidre L. Johnson was also in attendance to observe the conference.

2. Issues and Proposed Resolutions. The issues at the due process hearing are those alleged in the due process complaint, as clarified by the parties and the ALJ at the PHC<sup>2</sup>:

ISSUE ONE: Whether the District denied Student a Free and Appropriate Public Education (FAPE) during the 2007-2008 and 2008-2009 school years by failing to provide her with appropriate behavioral services, specifically:

- A. providing her with a less intensive behavior program;
- B. 1 to 1 aides who lacked the proper training; and
- C. 1 to 1 aides who failed to implement her behavior plans and collect appropriate data as required by the behavior program?

ISSUE TWO: Whether the District denied Student a FAPE during the 2007-2008 and 2008-2009 school years by failing to provide her with the necessary supports and services to make academic progress, specifically:

- A. after-school tutoring;
- B. pre-teaching and/or front loading services; and
- C. theory of the mind/ social skills programming/ adaptive living/ coping training?

ISSUE THREE: Whether the District denied Student a FAPE during the 2007-2008 and 2008-2009 school years by denying Student's parents an opportunity to meaningfully participate in the Individual Education Program (IEP) Process<sup>3</sup>?

ISSUE FOUR: Whether the District is currently denying Student a FAPE during the 2009-2010 school year<sup>4</sup> by failing to provide her with the appropriate services, specifically:

- A. providing her with a less intensive behavior program;
- B. 1 to 1 aides who lacked the proper training;
- C. 1 to 1 aides who failed to implement her behavior plans and collect appropriate data as required by the behavior program;

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<sup>2</sup> The Hearing ALJ may re-organize the issues by subject matter rather than chronologically at his/her discretion.

<sup>3</sup> An issue arose at the PHC regarding parent's contention that they were unable to meaningfully participate in the 2009-2010 school year IEP Process regarding a May 2009 IEP meeting that occurred involving a presentation of services for 2009-2010. As the services offered in the May 2009 IEP are already at issue, and the IEP meeting took place during the 2008-2009 school year, Student's request for there to be an issue as to whether Student's parents were able to meaningfully participate in the 2009-2010 school year IEP process was denied and the subsequent objection was duly noted.

<sup>4</sup> Student's claim for the 2009-2010 school year denial of FAPE services does not include the 2009-2010 ESY.

- D. after-school tutoring;
- E. pre-teaching and/or front loading services;
- F. theory of the mind/ social skills programming/ adaptive living/ coping training?

3. Exhibits. Exhibits shall be pre-marked and placed in a three-ring exhibit binder(s) prior to the hearing. Student's exhibits shall be labeled consecutively starting with S-1, and District's exhibits shall start with D-1. Each exhibit shall be internally paginated, by exhibit, or all of a party's exhibits shall be Bates stamped. Each exhibit binder shall contain a detailed table of contents. Each party shall serve an exhibit binder containing its respective exhibits on the other party by **5:00 p.m. on October 26, 2009.**

At the hearing, the parties are to supply an exhibit binder containing their respective 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 written declaration under penalty of perjury, and the ALJ rules that it is admissible.

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 pre hearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The following witnesses will be called to testify by Student: Stacy Peters, Darryl Peters, Dak Champeaux, Camille Taylor, Devan Anderson, Romina Kiryakaous, Dr. Leslie Depray, Amalie Holly, Michael Post, Amy Purcell, Dr. Keith Storey, Carrie Chapman, Kathy Diederich, Alyson Dyer, and Christine Merchant.

The following witnesses will be called to testify by District: Camille Taylor, Lisa Fereria, Trish Peterson, Lisa Mora, Heidi Hawes, Christine Merchant, Sonya Jarman, Jaime Volz, Kelly Bergman, Susan Winters, Sharon Filippi, Dr. Michael Jones, Toni Patterson and Carrie Chapman.

Student has identified 15 witnesses to be called at the hearing, and District has identified 14 witnesses. Some of the witnesses are listed by both parties. In light of the fact that five (5) days have been scheduled for the hearing in this matter, it would be difficult to complete the hearing as scheduled. Therefore, by **5:00 p.m. on October 26, 2009**, each

party shall serve on the other party and on OAH a more accurate and tentative witness list, including a time estimate of the length of each witness's direct examination testimony, and notations as to the witnesses the party intends to call, as opposed to witnesses the party may call.

The parties are ordered to thereafter meet and confer by **12:00 p.m. on October 28, 2009**, as to the schedule of witnesses. The parties have agreed to coordinate 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.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for 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.

5. Telephonic Testimony. A party seeking to call a witness to testify by telephone shall move in advance for leave to do so. Student's motion to allow two Doctors to testify telephonically is denied without prejudice to re-file upon a new showing of good cause.

District shall ensure that the hearing room has a speakerphone (in the event that telephonic testimony occurs) that allows everyone in the room to hear the witness.

6. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing.

7. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student shall present her case in chief first, since Student filed the complaint and District will proceed upon the conclusion of Student's case in chief. However, if a witness is to be called by more than one party, it is agreed that the need for presentation outside of the normal arrangement shall be modified as allowed at the discretion of the ALJ.

8. Motions. 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 PHC of October 19, 2009.

a) Motion to record Due Process Hearing<sup>5</sup>: The motion by Student to record the Due Process Hearing is **Granted** subject to the following conditions: Student must turn off the recording at the same time that the Hearing ALJ does when going on and off the record. Furthermore, Student may not play any part of the recording for

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<sup>5</sup> Originally, the first motion was to record the PHC. That motion was withdrawn prior to this ALJ hearing the motion.

any prospective witness or shall be subject to appropriate sanctions by the Hearing ALJ. The recording will not be the official recording and is permitted as a courtesy to Student. The court finds that the District's argument regarding Government Code section 11512, subsection d, is misplaced since that reference is to the formal hearing provisions of the Administrative Procedure Act which are not applicable to special education hearings.

b) Motion to exclude witnesses from Hearing: The motion by Student to exclude witnesses from the Hearing prior to their testimony is **Granted** except that the Parents are allowed to be present and the Director of Special Education or another District representative may be present as needed by the District in order to ensure appropriate representation.

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 witness shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, and other noisemaking electronic devices shall be shut off or set to vibrate during the hearing unless permission to the contrary is obtained from the ALJ.

District has agreed to secure a room of adequate size and the appropriate amount of tables and chairs to proceed with the due process hearing smoothly.

11. 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.

12. Hearing Open To the Public. At the request of the Student via parents, the hearing will be open to the public.

13. Settlement. The parties are encouraged to continue their attempts to reach an agreement before the due process hearing. Should the parties decide that another day of mediation prior to the hearing be helpful, the parties should meet and confer themselves and contact Presiding Judge Clark.

The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. If a settlement is reached five days or fewer than five days before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact by telephone at (916) 263-0880.

IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. THE LAST BUSINESS DAY PRIOR TO HEARING, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035, AND

SHALL ALSO LEAVE CELLULAR PHONE NUMBERS OF COUNSEL FOR EACH PARTY. The ALJ will check for messages the evening prior to the hearing and the morning of the hearing.

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

IT IS SO ORDERED.

Dated: October 20, 2009

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TRINA A. HIRSIG  
Administrative Law Judge  
Office of Administrative Hearings