

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MT. DIABLO UNIFIED SCHOOL
DISTRICT,

v.

STUDENT.

OAH CASE NO. 2009080174

ORDER FOLLOWING PREHEARING
CONFERENCE AND ORDER
GRANTING CONTINUANCE

On October 7, 2009, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH). Mathew Juhl-Darlington, Attorney at Law, appeared on behalf of Mt. Diablo Unified School District (District). Jack Bloxham, Attorney at Law, for Student,¹ did not make an appearance after a message was left at his office at approximately 10:05 a.m. regarding the PHC. Mr. Bloxham informed OAH on October 5, 2009, that Student would not participate in the PHC or Due Process Hearing. The PHC commenced at 10:20 a.m. and was recorded.

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

1. Hearing Dates, Times, and Location. The PHC and hearing are continued on motion of the District. The hearing shall take place on October 28 and 29, 2009. The hearing shall begin each day at 9:00 a.m. and end at 5:00 p.m., unless otherwise ordered, at 1936 Carlotta Drive, Concord, California.²

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 Student is over the age of 18, and retains his educational rights.

² District is ordered to reserve a suitable room for the hearing. The hearing room should have: (1) one table for the Parent and Student’s attorney or advocate; (2) one table for the District’s attorney or advocate and representative; (3) one table for the ALJ; and (4) one witness table. A boardroom can usually accommodate a due process hearing.

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:³

Does the District's offer of placement and services in the May 14 and 22, 2009 Individualized Education Programs (IEPs) and July 22, 2009 written program provide Student with a Free Appropriate Public Education (FAPE) in the least restrictive environment (LRE)?

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Student shall use numerical designations, starting with S-1, and the District shall use numerical designations, starting 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 21, 2009.⁴ 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. Any party requesting to play an audio recording at the hearing shall provide the appropriate player.

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 prehearing 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 the District: Ken Ferro, Barbara Shulman, Nancy Sullivan, Ph.D. (Expert), Sandy Conley, Carolyn Plath, and Parents.

³ Any amendments to a Due Process Complaint, not permitted by this Order, shall comply with California Education Code section 56502, subdivision (e). The filing of an amended complaint will restart the applicable timelines for a due process hearing. (Title 20 U.S.C. § 1415(c)(2)(E)(ii).)

⁴ For purposes of this Prehearing Conference Order, "file and serve" includes service by fax if the fax transmission is completed by 5:00 p.m. on the date provided for completion, provided the parties have consented to receive service by fax.

The following witnesses will be called to testify by Student: Student did not provide a list of potential witnesses.

The parties are ordered to meet and confer by October 26, 2009, as to the schedule of witnesses. The parties have agreed to coordinate the availability and order of testimony of witnesses, and 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. By 5:00 p.m. on October 26, 2009, each party shall serve on the other party and on OAH a tentative witness list, including the anticipated order of the witnesses, an estimate of the length of time for the direct examination, of each witness the party actually intends to call, along with time estimates for the testimony of any additional witnesses the party may call, depending on the flow of the hearing and the evidence.⁵ Each party shall provide to the ALJ and the other parties at the commencement of the hearing a schedule of proposed witnesses with an estimated length of testimony. 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. The District's motion to allow Dr. Sullivan to testify telephonically is granted. The District shall provide Dr. Sullivan with a complete exhibit binder from each party, 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.

6. 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 October 7, 2009.

7. On September 29, 2009, Student, through his attorney, submitted a letter to the District and OAH, which stated that Student would not participate in these proceedings, and does not wish to receive special education services from the District. Because of ambiguities in Student's letter, by October 8, 2009, the District will inform Student of his rights pursuant to Title 34 Code of Federal Regulations, part 300.300(b), to exit from special education services provided by the District, and Student shall respond to the District and OAH by October 15, 2009.

⁵ Parties shall not mail a hard copy of any document to OAH that has already been filed by facsimile transmission.

8. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

9. 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, recorders, 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.

10. Hearing Closed To the Public.

11. Settlement. The parties are encouraged to continue their attempts 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. 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 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 EACH COUNSEL FOR EACH PARTY. The ALJ will check for messages the evening prior to the hearing and the morning of the hearing.

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

IT IS SO ORDERED.

Dated: October 7, 2009

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings