

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

SAN FRANCISCO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2010100312

ORDER FOLLOWING PREHEARING  
CONFERENCE

On January 12, 2011, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Troy Taira, Office of Administrative Hearings (OAH). Damara Moore, Attorney at Law, appeared on behalf of San Francisco Unified School District (District). Parent appeared on behalf of Student. 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 January 25, 26, and 27, and February 1 and 2, 2011, at the District's offices located at 555 FRANKLIN STREET, 3RD FLOOR, SAN FRANCISCO, CA 94102. The hearing shall begin at 9:30 a.m., unless otherwise ordered.

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.

2. Issues and Proposed Resolutions. The issues at the due process hearing are listed below.<sup>1</sup>

a) Did District's individualized education plan (IEP) dated September 23, 2010, deny Student a free appropriate public education (FAPE) in the least restrictive environment

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<sup>1</sup> After considerable discussion regarding the issues during the PHC, the ALJ has reorganized Student's issues to ensure clarity. The reorganized issues set forth herein are consistent with Student's complaint and OAH's November 22, 2010 Order of Determination of Sufficiency.

when it moved Student from a special day class for learning handicapped (SDC-LH) students to a special day class for severely impaired (SDC-SI) students, because:

i. District failed to provide behavioral interventions, specifically an aide, in the SDC-LH, prior to moving Student to the SDC-SI;

ii. District's SDC-SI placement was more restrictive as Student had previously made educational progress in a lesser restrictive placement for learning handicapped students in another school district; and,

iii. District did not have a continuum of placement options available in the least restrictive environment?

b) Did District deny Student a FAPE during the 2010-2011 school year by failing to ensure his safety in his special education placement because Student was subjected to harassment?

c) Did District deny Student a FAPE during the 2010-2011 school year by unilaterally changing his placement from physical education to Reserve Officers' Training Corps without parental consent?

d) Did District deny Student a FAPE by failing to properly assess Student because:

i. Testing was administered by the teacher while she was teaching;

ii The teacher is biased against Student's disabilities, leading to inaccurate results;

iii. The assessment results did not reflect Students' learning deficits, strengths, and how he learns because it was administered in a new school setting; and,

iv. The assessments results were pre-determined to place Student in a more restrictive setting in the SDC-SI?

e) Did District significantly impede Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student, and therefore, deny Student a FAPE when it failed to offer Parents the right to record the September 23, 2010 IEP team meeting, failed to have the required attendees at the IEP team meeting and altered documents after the IEP team meeting to make it appear that Ray Cohen had attended the meeting?

f) Student's proposed resolutions:

i. A behavioral intervention plan, placement in a non-public school, and an independent psycho-educational assessment paid for by District.

Due to the number of issues presented in this cases, the ALJ and the parties may further clarify the issues at the commencement of the due process hearing.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. District will use numbers to identify their exhibits; Student will use letters to identify his exhibits. If both parties use numbers to identify exhibits, they 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”). The parties have agreed to place common exhibits into a joint binder (“J-1, J-2,” etc.). 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. The parties agreed to serve their evidence binders on each other at the mediation scheduled on January 20, 2011. Otherwise, evidence binders shall be exchanged in compliance with Education Code section 56505, subdivision (e)(7). 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 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 parties will 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.

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.

Parent has identified 12 witnesses to be called at the hearing, and District has identified 12 witnesses. Most of the witnesses are listed by both parties. At the PHC, the parties discussed the witness list for the first day of hearing, including a time estimate of the

length of each witness's direct examination testimony, depending on the flow of the hearing and the evidence. Prior to the commencement of the due process hearing and at the end of each day of hearing, the ALJ and the parties will discuss the length of time anticipated and scheduling issues for the 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. 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. (5 C.C.R. § 3082, subd. (g).) Any party seeking to present a witness by telephone shall move in advance for leave to do so, unless the opposing party has stipulated that the witness may appear by telephone. 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.

District's request to allow [Redacted] to testify telephonically is granted. District shall provide [Redacted] 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.

7. 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. The parties have agreed to exchange exhibits at the mediation scheduled on January 20, 2011.

8. Order of Presentation of Evidence. As the petitioner in the complaint, Student will present his evidence first and then District will present its evidence.

9. Motions. District renewed its notice of insufficiency dated November 18, 2010, on the grounds that OAH's Order of Determination of Sufficiency dated November 22, 2010, did not rule on District's objections. Specifically, District asserts that the claims relating to whether District offered to let Parents tape the IEP meeting and whether District had a continuum of placement options available are not legally cognizable and should be dismissed. As previously indicated, the issues addressed in OAH's ruling were reorganized, but they are consistent with the issues found sufficient in the complaint. The order found the issues relating to taping the IEP and the continuum of placement options sufficient to proceed. Since there was no motion for reconsideration or request for clarification, these claims were found sufficient. In addition, both issues raise factual disputes that can be

addressed by presenting evidence at hearing. Accordingly, District's request to dismiss these claims is denied.

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

11. 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.

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 translation services.

14. Hearing 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 SIMULATANEOUSLY 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: January 13, 2011

/s/

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TROY K. TAIRA  
Administrative Law Judge  
Office of Administrative Hearings