

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HIGH TECH HIGH AND DESERT/
MOUNTAIN SELPA.

OAH CASE NO. 2012020045

ORDER DENYING DISTRICT'S
MOTION TO ADMIT
SUPPLEMENTAL EVIDENCE

The due process hearing in this case convened on September 12, 13, 14, 21, 28 and October 4 and 19, 2012, before Administrative Law Judge (ALJ) Paul H. Kamoroff, from the Office of Administrative Hearings (OAH), State of California, in San Diego, California. At the close of the hearing on October 19, 2012, during a discussion of the briefing schedule for submission of written closing briefs, the undersigned ALJ ruled that no further evidence, other than the written closing briefs, would be accepted for this matter. Neither Parent on behalf of Student (Student), or the High Tech High and Desert/Mountain SELPA (District), raised any objection to this order excluding additional evidence.

On November 9, 2012, District filed a motion to supplement evidence (Motion). District attached a document to its motion, which it seeks to include as supplemental evidence for this matter. The document is a school transcript with handwritten grades. District also attached an affidavit to its Motion, which is from Student's Biology teacher, Dr. Jay Vavra. Student timely opposed District's Motion.

APPLICABLE LAW

Special education law does not address the reopening of the evidentiary record after the hearing. Using civil law principles as guidance, the reopening of a case to receive additional evidence is generally a matter within the trial court's discretion. (*Horning v. Shilberg* (2005) 130 Cal.App.4th 197, 208, citing *Rosenfeld, Meyer & Susman v. Cohen* (1987) 191 Cal.App. 3rd 1035, 1052-53.)

Education Code section 56505, subdivision (e)(7), requires the parties to a special education dispute to disclose their documents to each other at least five business days prior to the hearing. Education Code section 56505.1, subdivision (f), authorizes the ALJ hearing the case to bar introduction of any documents not disclosed to the other party, without the consent of the other party, as required by section 56505, subdivision (e)(7). In this case, consistent with that provision, the Order Following Prehearing Conference dated

September 6, 2012 (PHC Order) contained an advisement that failure to comply with the order could “result in exclusion of evidence or other sanctions.”

DISCUSSION

In District’s Motion, it asserts that essential evidence has been omitted from this matter. Specifically, District contends that evidence clarifying the grade that Student received in Bio 131- Introduction to Biotechnology (course) at San Diego Miramar College in 2010, was omitted. District complains that Student’s grade in the course was incorrectly stated as a D- during the Due Process Hearing for this matter. District now possess evidence demonstrating that Student’s grade was inadvertently entered as a D-, when Student actually earned a C in the course.

Student opposes District’s Motion on the basis that the District had ample opportunity to present the supplemental evidence over the course of the seven day due process hearing. Student further complains that admitting the evidence without proper authentication and an opportunity to cross examine the author of the supplemental evidence, Dr. Sandra Slivka, would unduly prejudice Student and, thus, is not only untimely, but also unfair.

In weighing whether the documents should be admitted or excluded, OAH generally looks for prejudice and weighs the equities. Here, the supplemental evidence submitted included a declaration from Student’s Biology teacher, Dr. Jay Vavra. However, the District asserts that the author of the document was Dr. Sandra Slivka, not Dr. Vavra. Dr. Slivka did not sign an affidavit authenticating the supplemental evidence. Moreover, the grades on the supplemental evidence are handwritten by an unidentified person. Dr. Vavra’s affidavit does not state that he is familiar or has personal knowledge of Dr. Slivka’s handwriting. Dr. Slivka was not listed on the District’s witness list and was not one of the 14 witnesses who testified in this manner. Student has not had the opportunity to cross examine Dr. Slivka to determine the authenticity of this document.

It is troubling that District’s motion does not comply with the ALJ’s instructions as there is no declaration under penalty of perjury from the teacher who hand wrote the pending grade. In addition, District failed to adhere to the PHC Order’s provision for advance disclosure, or to disclose the documents to Student at least five business days in advance of the hearing as required by law. The document is therefore subject to exclusion.

Student was entitled to advance disclosure of the document in order to prepare for hearing and cross-examine Dr. Slivka and/or Dr. Vavra on the record as to the document. In view of District’s failure to timely disclose the document, the lack of authentication of the document, and a showing of some prejudice to the Student, District’s document will not be admitted into evidence.

ORDER

District's motion for admission of supplemental evidence is denied.

Dated: November 28, 2012

/s/

PAUL H. KAMOROFF
Administrative Law Judge
Office of Administrative Hearings