

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

CUPERTINO UNION SCHOOL
DISTRICT.

OAH CASE NO. 2012020850

ORDER GRANTING STUDENT'S
MOTION TO ADMIT
SUPPLEMENTAL EVIDENCE FOR
LIMITED PURPOSES ONLY

This matter was heard before Administrative Law Judge Deidre L. Johnson (ALJ), Office of Administrative Hearings (OAH) on May 21 and 22, 2012, in San Jose, California. At the close of the hearing on May 22, 2012, during a discussion of the exhibits and briefing schedule for submission of written closing argument, Student asked that the record be held open for submission of supplemental documentary evidence. The proposed documents pertained to Student's request for reimbursement of expenses Parents incurred, consisting of insurance co-payments for certain applied behavior analysis (ABA) services they privately obtained for Student. After discussion, the ALJ denied the request to hold the evidentiary record open. The ALJ instructed the parties that if either wanted to move to submit more documents, the requesting party should include a declaration under penalty of perjury as to why the documents had not been disclosed to the other party in compliance with the law, and presented at hearing.

On June 5, 2012, Student filed a Motion to Consider Receipts of Parental Expenditure of Hiring Private ABA Services for Reimbursement, accompanied by invoices addressed to Parents from the Center for Autism and Related Disorders (CARD) dated December 31, 2011, January 31, 2012, and February 29, 2012. On June 8, 2012, District filed a response opposing the 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. A denial of a request to reopen may be an abuse of discretion. (*Horning v. Shilberg* (2005) 130 Cal.App. 4th 197, 208, citing *Rosenfeld, Meyer & Susman v. Cohen* 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 May 2, 2012 (PHC Order) contained an advisement that failure to comply with the order could “result in exclusion of evidence or other sanctions.”

DISCUSSION

In Student’s motion to reopen the record and admit the CARD receipts for Parents’ expenses incurred for ABA services, Father explains that because Parents were involved in providing care to Student as a result of his emergency hospitalization in early May 2012, they forgot to include reimbursement evidence in his exhibit binder. In addition, he explains that, due to taking care of Student, they forgot to submit the evidence to OAH. However, during the hearing, Father claimed he did not submit the invoices because his insurance company delayed processing payments covering the services (somehow implicating the co-pay amounts Parents paid).

In weighing whether the documents should be admitted or excluded, OAH generally looks for prejudice and weighs the equities. In this case, it was apparent on the record that until the end of the hearing, Father had failed to realize he had not submitted documentary proof to support Student’s reimbursement request. When he realized he had forgotten to include proof of Parents’ payments to CARD for Student’s ABA services, Father was not candid in his explanations. However, there is no evidence that Parents attempted to hide the ABA invoices and receipt documents, or otherwise engaged in any bad faith. They made a mistake in failing to include three receipts in their evidence binder.

It is troubling that Student’s motion does not comply with the ALJ’s instructions as there is no declaration under penalty of perjury, either from Father or from a representative of CARD to authenticate the documents. In addition, Student failed to adhere to the PHC Order’s provision for advance disclosure, or to disclose the documents to District at least five business days in advance of the hearing as required by law. The documents are therefore subject to exclusion.¹

Father’s explanation is imprecise because Parents submitted Student’s exhibit binder to District prior to his emergency hospitalization. During the May 2, 2012 PHC, OAH directed the parties to serve their respective documentary exhibits on each other on the same date, pursuant to the parties’ express stipulations. Father did not ask OAH during the PHC

¹ In the PHC Order, OAH ordered that “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.”

for more time to prepare his documents but agreed to deliver them that day. At that time, the hearing was set to begin on May 8, 2012. Student duly and timely prepared 13 exhibits for hearing in an organized binder, and served his exhibits on District, but they did not include any documentation for claimed expenses. That failure is found to be inadvertent and not deliberate. On May 7, 2012, Father requested a continuance of the hearing due to Student's emergency medical problems and hospitalization.² Father expressly requested a hearing on dates between May 21, and May 31, 2012, and did not request further time to prepare for hearing. However, in preparing for hearing, Parents continued not to realize their mistake.

Student's complaint did not expressly request reimbursement as a proposed resolution, but requested an order from OAH for the District to "get" ABA services for Student, generally construed as paying for prospective services. It is arguable, however, that District was on notice of a reimbursement, rather than a funding, request because the resolution said Parents had already retained the services. While Father testified that Blue Shield Insurance Company paid for the ABA services, he did not mention Parents' co-payment obligations or expenses until the end of the hearing. That Parents are not represented by legal counsel and English is not Father's first language are also taken into consideration by the ALJ.

District was entitled to advance disclosure of the documents in order to prepare for hearing and cross-examine Father and/or CARD on the record as to the documents. In view of Student's failure to timely disclose the documents and a showing of some prejudice to the District, Student's documents will not be admitted into evidence as direct evidence of the expenses Parents incurred.

However, ultimately, it is the hearing officer's responsibility to decide the case, including consideration of any proposed remedy for reimbursement. Weighing all of the equities, there is no showing of bad faith and the record should include at least some evidence to support Student's claim for reimbursement. Hearsay evidence is admissible in special education cases to explain or supplement other direct evidence.³ However, special education law prohibits the use of hearsay as the sole basis upon which to render a finding of fact. (Cal. Code Regs., tit. 5 § 3082, subd. (b).) Thus, Student's CARD receipts may be admitted as hearsay to explain or supplement Father's testimony that Parents incurred some costs in connection with the private ABA services. However, the documents cannot be used

² Father's request for a continuance was under penalty of perjury, demonstrating that he knew how to prepare such a declaration.

³ Hearsay evidence is evidence of a statement made by someone other than as a witness while testifying, that is offered to prove the truth of the matter stated, and is inadmissible unless it meets the requirements of an exception. (Jefferson, California Evidence Law (1985), Part 1, *The Hearsay Rule*, Chapter 1 § 1.1.) Here, the special education regulation supplies the applicable exception. (Cal. Code Regs., tit. 5 § 3082, subd. (b).)

to establish exact monetary amounts as Father did not provide such testimony. The evidentiary record is therefore reopened. Student's ABA receipt documents are marked for identification as Student's Exhibit 14, and are admitted into evidence solely as hearsay.⁴ District is entitled to submit a response to the hearsay documents for the record, including any argument and/or any rebuttal evidence, as ordered below.

ORDER

1. Student's motion for admission of supplemental evidence is granted.
2. The record is reopened for the limited purpose of admitting Student's ABA receipts into evidence as hearsay, and the documents are admitted as Student's Exhibit 14.
3. District may submit a written response to Student's supplemental documents, including any rebuttal evidence, within five business days of the date of this Order. If District does not file any rebuttal evidence, the record will be closed and resubmitted for decision.
4. Should District's response include any rebuttal evidence (new documents or testimony by way of a declaration under penalty of perjury), Student will have one right of reply, to be filed within five business days thereafter. The record will then be closed and resubmitted for decision.

Dated: June 18, 2012

/s/

DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings

⁴ Student is admonished to adhere to OAH orders and the special education disclosure laws in any future cases or face exclusion of his evidence or other appropriate sanctions.