

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

COUNTY OF TULARE OFFICE OF
EDUCATION AND BURTON SCHOOL
DISTRICT.

OAH Case No. 2014100996

ORDER FOLLOWING PREHEARING
CONFERENCE, SETTING DATES FOR
HEARING AND DISMISSING PARTY

On December 12, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Joy Redmon, Office of Administrative Hearings. Robert Closson, Ed.D. appeared on Student's behalf and Father listened to the PHC but did not participate. Attorney Daniel Osher appeared on behalf of Tulare County Office of Education and Burton School District. The PHC was recorded.

Based on discussion with the parties, the ALJ issues the following orders:

1. Hearing Dates, Times, and Location. The hearing shall take place at **264 N. Westwood Street, Porterville, CA 93257**. It was initially scheduled for December 17 but after discussion with the parties, December 18, 2014, was added. If the matter is not completed in two days, it will continue day-to-day thereafter, Monday through Thursday, at the discretion of the ALJ.¹ On December 17, 2014, the hearing shall begin at 9:30 a.m. and end at 5:00 p.m., and shall begin at 9:00 a.m. and end at 5:00 p.m. on remaining days, unless otherwise ordered. Burton shall ensure that the facility for the hearing fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

The parties shall immediately provide hearing dates to proposed witnesses, and shall subpoena witnesses if necessary, to ensure their availability. Failing to properly notify or subpoena a witness does not constitute good cause for their unavailability.

2. Issues and Proposed Resolutions. The issues below were discussed at the PHC and reworded for clarity:

¹ If this hearing proceeds beyond the two calendared days, the day-to-day schedule may be adjusted by the ALJ in light of the impending holidays.

Issue 1: Did Burton deny Student a free appropriate public education by failing to provide an individual aide in the general education classroom for the school day in compliance with the November 8, 2013, individualized education program?²

Proposed Resolutions: Student seeks an order requiring that Burton commit to following through on all future commitments and proposed changes at the agreed upon timeframe; operate in full transparency with regard to the Student's educational goals; make every effort to communicate any proposed changes to the Student's educational setting with the parents before implementing any changes, and respond to all telephone calls and emails within one business day.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall number exhibits in a way that clearly identifies the party offering the exhibit (for example "S-1" for Student or "D-1" for District). All pages of a party's exhibit binder shall be consecutively numbered. Each exhibit will consist of one document or short series of documents that are related (for example, each IEP shall have its own exhibit rather than a single exhibit for all IEP's). 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 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 will not be admitted into evidence at the hearing unless it is supported by a written declaration under penalty of perjury, and the ALJ rules that it is admissible.

4. Witnesses.

a) Each party is responsible for procuring their own witnesses; however, the parties shall make witnesses under its control reasonably available to the other party.

² While clarifying issues, Student asserted procedural and substantive denials of FAPE regarding the November 8, 2013, IEP beyond the failure to implement an aide. Burton objected arguing that the complaint only asserted a claim regarding its failure to implement an inclusion aide in the general education classroom consistent with the November 8, 2013, IEP. The complaint was specific and only included the issue regarding the aide. Accordingly, the issue was not expanded. The complaint also alleged an issue regarding the failure to implement an aide pursuant to an addendum meeting held on August 8, 2014. Student clarified that the only agreed upon and implemented IEP was the November 8, 2013, IEP and therefore, issue two in the complaint was withdrawn.

Witnesses shall be scheduled in a way that avoids delays and minimizes or eliminates having to call a witness twice or out of order. Only witnesses disclosed in a party's prehearing conference statement may testify, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

b) The parties are ordered to meet and confer to develop a proposed joint witness schedule. The proposed schedule will be presented to the ALJ at the beginning of the hearing. Prior to commencing the hearing, the ALJ and the parties will discuss the proposed witness schedule and address scheduling issues for individual witnesses, before the schedule is finalized. The ALJ has discretion to limit the number of witnesses and the length of their testimony.

5. Scope of Witness Examination. After the first direct and cross-examinations, each party will only question the witness on matters raised in the immediately preceding examination. Parties shall be required to establish their cases in chief (conducting both direct and cross) so that each witness only appears once.

6. Telephonic Testimony. A party must ask in advance if it intends to present a witness via telephone; if granted, the party shall provide the proposed witness with a complete set of exhibit binders from all parties, 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. Neither party has requested telephonic testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. At present, Student intends to record the hearing. The following conditions apply to any recording: 1) that OAH's recording is the only official recording; 2) that the recorder will be turned on and off at the same time as the ALJ's recording, to avoid recording conversations while off the record; and 3) the operation of the party's recording mechanism will not be allowed to delay the hearing.

b. Video Recording. No party, witness or anyone else present may make any video recording of any part of the proceedings. Any person doing so shall be subject to sanctions.

8. Motions. Motion to Dismiss Tulare. On December 8, 2014, Tulare filed a motion to be dismissed as a party asserting that no allegations were raised in the complaint nor remedies sought against Tulare. Burton joined in Tulare's motion to dismiss. Student filed an opposition to the motion asserting that Tulare operates the Special Education Local Plan Area of which Burton is a member and that Tulare has participated in Student's IEP team meetings and resolution session.

Special education due process hearing procedures extend to the parent or guardian, to the student in certain circumstances, and to "the public agency involved in any decision regarding a pupil." (Ed. Code, section 56501, subd. (a).) A "public agency" is defined as "a

school district, County office of education, special education local plan area, ...or any other public agency providing special education or related services to individuals with exceptional needs.” (Ed. Code, sections 56500 and 5628.5.)

In this case, no allegations regarding Tulare were raised in the complaint nor were any remedies sought against Tulare. As such, Tulare is not a proper party to this action and was dismissed as a party during the PHC.

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. Compensatory Education and 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. Any party seeking compensatory education shall provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

11. Conduct and Hearing Room Decorum. Counsel, all parties, and all witnesses 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. Special Needs and Accommodations. At present neither party anticipates the need for any special accommodation for any witness or party. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the hearing may contact the assigned calendar clerk at (916) 263-0880, the OAH ADA Coordinator at OAHADA@dgs.ca.gov or 916-263-0880 as soon as the need is made known. Additional information concerning a requests for reasonable accommodation is available on OAH’s website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

13. Hearing Open To the Public. At Student’s request the hearing will be open to the public.

14. 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 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 EACH PARTY OR COUNSEL FOR EACH PARTY.

Dates for hearing will not be vacated until OAH receives a letter of withdrawal, or those portions of the signed agreement withdrawing the case, with signatures. 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.

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

IT IS SO ORDERED.

DATE: December 12, 2014

/s/

JOY REDMON
Administrative Law Judge
Office of Administrative Hearings