BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. BURBANK UNIFIED SCHOOL DISTRICT,	OAH Case No. 2018100167
BURBANK UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2019040544 ORDER FOLLOWING PREHEARING CONFERENCE

On May 6, 2019, a telephonic prehearing conference was held before Administrative Law Judge Cole Dalton, Office of Administrative Hearings. Jane DuBovy and Mandy Favaloro, Attorneys at Law, appeared on behalf of Student. Lauri Arrowsmith, Attorney at Law, appeared on behalf of Burbank Unified School District. The PHC was recorded.

Burbank served its response to Student's complaint on January 31, 2019. (*M.C. v. Antelope Valley Unified Sch. Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

Based upon discussion with the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on May 14, 15, and 16, 2019, and continuing day to day[1] at the discretion of the ALJ. The hearing shall take place at the Burbank's offices located at 1900 West Olive Avenue, Burbank CA 91505. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered. Burbank shall reserve one parking space each for Parents, Student's Attorney, and the ALJ.

As ordered in the scheduling order, the named local educational agency shall provide a facility for the hearing that fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C.A. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.), the Unruh

[1] The parties requested three additional days of hearing and stipulated to proceeding on May 21, 22, and 23, 2019. Additional hearing dates shall be set by the hearing ALJ.

Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency certified that the facilities used for this case comply with the law.

Prior to the beginning of the hearing, District shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for District's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. District shall ensure that the hearing room and access to it are in compliance with the Americans with Disabilities Act.

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, and the proposed resolutions, are listed below.

Student's Issues

(1) Did Burbank deny Student a free appropriate public education by failing to conduct a functional behavior assessment from October 21, 2018 through the filing of Student's first amended complaint on January 14, 2019?

(2) Did Burbank deny Student a FAPE by failing to comply with all legal requirements regarding Burbank's March 2018 assessments in the areas of (a) psychoeducation; (b) academics; (c) speech and language, including alternative augmentative communication; and (d) occupational therapy?

(3) Did Burbank deny Student a FAPE in the development of his individualized education programs dated (a) March 13, 2018, (b) June 6, 2018, and (c) January 10, 2019, by:

(i) Failing to:

(A) Consider the concerns of Parents for enhancing the education of Student;

(B) Consider the results of any outside assessments;

(C) Include all required content, specifically, a sufficient statement of present levels of academic achievement and functional performance; measurable annual goals in any area of need; and special education and related services based upon peer reviewed research to the extent practicable;

(D) Consider the use of positive behavioral interventions, supports, and strategies to address behaviors impeding Student's learning or that of others and include a statement of the intervention, accommodation, or program modification Student requires to address such behaviors;

(E) Include a statement of assistive technology devices or services Student required to receive a FAPE;

(F) Consider whether the nature or severity of Student's disability was such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily; and

(G) Consider the full continuum of placement options available, including placement in a typical preschool setting; and by

(ii) Predetermining its offer of placement and services?

(4) Did Burbank deny Student a FAPE by failing to provide legally compliant prior written notice after IEPs dated March 13, 2018, June 6, 2018, and January 10, 2019, regarding Burbank's refusal to offer:

(i) Placement in a general education setting with supplementary aids and services;

(ii) Applied behavioral analysis interventions consisting of a one-on-one aide for the full school day and direct one-on-one intervention outside the school day for 30 hours per week; and

(iii) Related services in the frequency and duration recommended by private experts and requested by Parents in the areas of speech and language and occupational therapy?

(5) Did Burbank deny Student a FAPE in IEPs dated March 13, 2018, June 6, 2018, and January 10, 2019, by failing to offer appropriate:

(i) Annual goals in all areas of need;

(ii) Behavior plans;

(iii) Related services in speech and language; occupational therapy; and applied behavior analysis including a one-on-one aide for the full school day and direct one-on-one intervention outside the school day for 30 hours per week;

(iv) Placement in a typical general education preschool setting with a small class size, small student to teacher ratio, structured educational programming, and typically developing peer role models; and

(v) Placement in a typical general education preschool setting with related services in speech and language, occupational therapy, and applied behavior analysis consisting of a one-on-one aide for the full school day and direct one-on-one intervention outside the school day for 30 hours per week for the extended school year and continuing weeks of service without breaks to prevent regression?

As remedies, Student seeks reimbursement for independent assessments obtained by Parents and independent educational evaluations. Student seeks reimbursement for tuition and costs of placement at Disney Children's Center and for related services in the areas of applied behavior analysis, speech and language, occupational therapy, assistive technology, and mileage reimbursement for attending such placement and services. Student further seeks compensatory education, in areas including occupational therapy and speech and language.

Burbank's Issues

(6) Did Burbank's February 14, 2019 individualized education program offer Student a free appropriate public education?

Burbank seeks an order finding that it offered Student a FAPE in the February 14, 2019 IEP.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties shall use numbers to identify exhibits, but 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"). 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 shall serve their evidence binders on each other 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.

The parties shall meet and confer by no later than **5:00 p.m. on May 10, 2019**, to discuss exhibits and eliminate duplicate exhibits from the exhibit binders.

Each exhibit shall consist of one document; separate documents may not be combined into one exhibit. Excerpts of an audio record of an individualized education program team

meeting, if any, should be transcribed and offered as documentary evidence; that portion of the audio record transcribed shall be provided to the opposing party with the transcript to allow an opportunity to verify the accuracy of the transcription. Transcription need not be done by a certified court reporter.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Burbank shall include as part of its exhibits the school calendar(s) for the years at issue.

If the parties intend to rely on individualized education programs, the parties shall attach all pages of the IEP(s), including copies of all actual signatures on the IEP(s) and any typewritten or handwritten notes or comments, if any, written on the IEP(s).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not timely 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 timely disclosed except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

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.

The parties shall meet and confer by **5:00 p.m. on May 10, 2019,** as to the schedule of witnesses and coordinate the availability and order 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.

On the first day of hearing before the first witness testifies, the parties shall provide the ALJ with one **joint** detailed hour-by-hour schedule of all witnesses expected to testify at hearing, which list shall also include an estimate of time for each party's direct and cross-examination. The witness schedule should include consideration of breaks for lunch and between witnesses.

Burbank shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony each witness is expected to take.

5. Scope of Witness Examination. Each witness shall be called to testify only once, except for rebuttal purposes, and all parties shall examine the witness on all issues when the witness is first called. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear only once.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. (Cal. Code Regs., tit. 5, § 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. The proponent of the witness shall ensure the witness testifies from a private location with no other persons present using a "land-line" 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.

7. Electronic Recording of Hearing.

a. Audio Recording. Student's motion to make an audio recording of the hearing is granted, subject to the following conditions, which shall be applicable to both parties: (1) Such recording shall be for counsel's personal use only and only for review and preparation of the hearing; (2) The recording device shall be turned on only when the ALJ states that the matter is on the record, and shall be turned off when the ALJ states that the matter is off the record; (3) The hearing will not be stopped or delayed at any time to accommodate the recordings or any problems with the recording equipment; (4) The parties shall not play any part of the recording for any prospective witness(es) and the recording shall not be disseminated; (5) The parties shall not use the recording in any subsequent due process hearing; and (6) The parties shall dispose of the unofficial recording when the time for filing an appeal has passed or, in the event of an appeal, when the time for submission of the record on appeal has passed. Any recording made by either party is not the official record and is permitted as a courtesy, unless otherwise ordered by the hearing ALJ. The OAH recording made by the hearing ALJ is the official record unless otherwise ordered.

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. Order of Presentation of Evidence. In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, each party has the burden of proof on their respective issues. Student shall present his case-in-chief, followed by Burbank.

9. 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 filed three business days prior to and heard during the prehearing conference of May 6, 2019.

10. 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.

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

12. Conduct of Counsel 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.

13. Special Needs and Accommodations. Neither party requested accommodations during the PHC.

A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the mediation or hearing may contact the assigned calendar staff, identified in the scheduling order, at (916) 263-0880, or email the OAH ADA Coordinator's office as soon as the need is known. The e-mail address for the office is OAHADA@dgs.ca.gov and the e-mail should have "Request for Accommodation" in the Subject Line. Additional information concerning requests for reasonable accommodation is available on OAH's website at https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

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 SIMULTANEOUSLY EMAIL THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT https://www.applications.dgsapps.dgs.ca.gov/oah/oahsftweb .

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.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall notify OAH that the settlement is subject to board approval, and provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

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

IT IS SO ORDERED.

DATE: May 9, 2019

DocuSigned by:

COLE DALTON

Administrative Law Judge
Office of Administrative Hearings