BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: PARENT ON BEHALF OF STUDENT, v. BURBANK UNIFIED SCHOOL DISTRICT.	OAH Case No. 2018030791 ORDER FOLLOWING PREHEARING CONFERENCE

On August 31, 2018, a telephonic prehearing conference was held before Administrative Law Judge Christine Arden, Office of Administrative Hearings. Mother appeared on behalf of Student.[1] OAH provided a Spanish interpreter, Claudia Maraboto. Tamra Kaufman and Shannyn Shafer Attorneys at Law, appeared on behalf of Burbank Unified School District. The PHC was recorded.

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

1. Hearing Dates, Times, and Location. The hearing shall take place on September 11, 12 and 13, 2018, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at the Burbank Unified School District'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.

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 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. The local educational agency shall inform OAH within two days of the date of this order if it is unable to comply with this order.

Prior to the beginning of the hearing, Burbank Unified School 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 her representatives; (2) a table for Burbank Unified School District's legal

[1] On July 27, 2018, Mother filed a letter with OAH stating that her husband is authorized to execute business matters in her absence and that he will be a witness in this case. Student served Burbank Unified School District with such letter on August 2, 2018.

representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Burbank Unified School 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. Burbank Unified School 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. Issue and Proposed Resolutions. The issue at the due process hearing, and the proposed resolutions, are listed below.

Issue: Did Burbank Unified School District deny Student a free appropriate public education by breaching its child find obligation when it failed to identify Student as a child with a disability eligible for special education?

Proposed resolutions: Student proposes an order directing Burbank Unified School District to provide Student with tutoring by a non-public agency and weekly counseling by a private therapist.

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 her/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.

Student did not file a PHC statement. At the PHC Mother identified the following documents that Student intends to offer into evidence at hearing: (1) IEP dated December, 2016; (2) special evaluation done by Penny Lane, dated approximately September, 2016; and (3) report cards from Student's first, second and third grade years.

Mother and counsel for Burbank Unified School District are ordered to meet and confer regarding exhibits, and to identify and produce to each other any exhibits that the parties intend to offer into evidence. Both parties shall exchange exhibits by **5:00 p.m. on**

September 4, 2018, at the latest, which is five business days before the first day of hearing. (Ed. Code, § 56505, subd. (e)(7).)

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit either not included in the exhibit lists or identified at the PHC, 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.

The parties shall exchange resumes for each witness who is expected to testify as to their professional credentials. Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), the parties shall exchange resumes, if any, not later than **5:00 p.m. on September 4, 2018**. Such resumes shall be included in exhibit binders. District shall include as part of its exhibits the **school calendar(s) for all of the years at issue.** Notwithstanding the requirements of Education Code section 56505, subdivision (e)(7), District shall serve a copy of the school calendars for all applicable school years on Student not later than **5:00 on September 4, 2018**.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of her/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 either in a party's prehearing conference statement, in an amended witness list served on the other party at least five business days before hearing, or disclosed at the PHC, except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ. At the PHC Mother identified the following witnesses Student intends to call at hearing: (1) Student's Father; (2) Oscar Tolentino, family friend; (3) Student's Mother; (4) Yuri Estrada, special education assessor; and (5) Student.

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 no later than **5:00 p.m. on September 4, 2018**, and identify the witnesses on her/its respective witness list who cannot be produced at hearing without a subpoena. Burbank Unified School District shall provide to Student the last known contact information for any former employees of District or current employees of the Burbank Unified School District who will be on vacation and not under Burbank Unified School District's control at the time of hearing, so that subpoenas can be issued to those witnesses.

The parties shall attempt to reach an agreement on a witness list for the first day of hearing. Burbank Unified School District shall have witnesses available in case agreement on a witness list is not reached. On the first day of hearing before the first witness testifies, the parties shall submit to the ALJ 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. Before the first witness testifies at the due process hearing, the ALJ and the parties will discuss the length of time anticipated for direct and cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule. Additionally, 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 of each such 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 at hearing.

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; ensure the witness testifies from a private location with no other persons present, using a "land-line", unless the ALJ orders otherwise; and 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.

Neither party requested telephonic testimony at the PHC, so none is anticipated.

7. Electronic Recording of Hearing.

a. Audio Recording. Burbank Unified School District's motion to make an audio recording of the hearing is granted, subject to the following conditions: (1) such recording shall be for the parties' 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) operation of a personal recording device will not delay the hearing; (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; (6) the recording is subject to the same confidentiality as the due process hearing; and (7) the parties shall dispose of the unofficial recording when the time for appeal of the ALJ's decision in this matter has expired. 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, Student is the petitioning party. Accordingly, Student shall present her case-in-chief, followed by Burbank Unified School District.

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 made prior to or during the prehearing conference of August 31, 2018.

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 her/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. Mother requested that she be assisted by a Spanish language interpreter at hearing. Such request was granted. No other accommodations were requested by either party.

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, as soon as the need is known. 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 with the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

If the parties settle the matter subject to school board approval, in addition to a signed copy of the signature page of the settlement agreement as noted above, the parties shall also submit a request for a status conference and provide the date of the school board meeting at which board approval of the settlement will be addressed. OAH will not cancel the hearing dates 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: August 31, 2018

DocuSigned by:
Christine Arden
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CHRISTINE ARDEN
Administrative Law Judge
Office of Administrative Hearings