

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

KEYES UNION ELEMENTARY SCHOOL
DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2013060774

ORDER FOLLOWING PREHEARING
CONFERENCE

On September 9, 2013, a telephonic prehearing conference (PHC) was held before Administrative Law Judge (ALJ) Margaret Broussard, Office of Administrative Hearings (OAH). Sarah Garcia, Attorney at Law, appeared on behalf of the Keyes Union School District (District). There was no appearance on behalf of Student.¹ The PHC was recorded.

The following orders are issued:

1. Hearing Dates, Times, and Location: The hearing shall take place on **September 17, 18 and 19, 2013.** Unless otherwise ordered, the hearing shall begin at **9:30 a.m.** on September 17, 2013, and at **9:00 a.m.** on all other days. **The hearing shall be held at Keyes Elementary School, 5680 7th Street, Keyes, CA 95328.**

¹ Shortly before the time scheduled for the PHC, the undersigned ALJ called the phone number for Parents listed on the District's complaint. The person who answered the phone at that number stated that the phone number does not belong to Parents any longer. Attorney Sarah Garcia then provided the ALJ a cellular phone number for Father and a cellular phone number for Mother. At approximately 3:00 p.m., the ALJ called both Father and Mother's cellular phones several times. The phones rang and then a message came on that stated that no voicemail had been set up on either line and that no messages could be left. At approximately 3:08 p.m., the ALJ called Father's cellular number and Father answered. The ALJ asked if Father was prepared to go forward with the PHC, and Father stated he wanted to discuss a continuance with the District so the parties could attend another mediation. The ALJ informed Father that the PHC would go forward at 3:15 p.m. and that he could make a motion for a continuance at the PHC or he could contact the attorney for the District and, if she was in agreement, they could make a joint request for a continuance at the PHC. At 3:15 p.m. the ALJ called Father's cellular phone number five times in order to secure his participation in the PHC. Father did not answer and no voice mail was available.

2. Notice to Witnesses: The parties shall immediately notify their witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available to the other party without the need for a subpoena. The District agreed to make District employees called as witnesses by Parents available with 72 business hours' notice and would make all reasonable attempts to make County Office of Education witnesses available. A witness will not be regarded as unavailable for purposes of showing good cause to continue the hearing if the witness has not been properly notified of the hearing date or properly subpoenaed, as applicable. Student did not file a PHC statement.

3. Issues: The issues for hearing are limited to those alleged in the District's complaint.² The issues were discussed during the PHC and are reframed and clarified below.

I. Did the individualized educational program (IEP) dated April 18, 2013, offer Student a free appropriate public education (FAPE), from April 18, 2013 through May 30, 2013, by providing an early intensive behavioral treatment program 1200 minutes per week, with individual and small group instruction from Therapeutic Pathways, a non-public agency (NPA), for 47 weeks per year?

II. Does IEP dated May 30, 2013, offer Student a FAPE by providing an early intensive behavioral treatment program 2100 minutes per week, with individual and small group instruction from Therapeutic Pathways, a non-public agency (NPA), for 47 weeks per year?

4. Proposed Resolutions: The District has proposed the following resolutions:

I. A determination that the District's April 18, 2013 IEP offered Student a FAPE from April 18, 2013 through May 30, 2013 by providing an early intensive behavioral treatment program 1200 minutes per week, with individual and small group instruction from Therapeutic Pathways, a non-public agency (NPA), for 47 weeks per year.

II. If Parents want Student to receive special education from the District, the District should be allowed to implement the May 30, 2013 IEP offer over Parents' objection by providing an early intensive behavioral treatment program 2100 minutes per week, with individual and small group instruction from Therapeutic Pathways, an NPA. for 47 weeks per year, because that offer constituted a FAPE for Student based on all of the information available to the IEP team as of that date.

² The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) The issues have been reworded and reordered to ensure clarity.

5. Exhibits: Exhibits shall be pre-marked by each party and placed in a three-ring exhibit binder prior to the hearing. The parties' exhibits shall be pre-marked using numbered tabs. Each exhibit binder shall contain a detailed table of contents or list of the documents it contains. Student's exhibit list shall identify each exhibit by number and the designation "S" (e.g., S1), and the District's exhibit list shall identify each exhibit by number along with a "D" (e.g., D1). Any document over five pages in length shall be internally paginated, or all pages in the binder shall be Bates-stamped or consecutively paginated. Each party shall serve an exhibit binder containing its respective exhibits and list on the other party not less than five business days prior to the start of the hearing.

At the hearing, the parties shall supply an additional exhibit binder containing their respective exhibits and lists for use by the ALJ, and another exhibit binder for use by the witnesses. In the event of duplicate exhibits, the most legible version will be used, unless otherwise ordered. The parties shall not serve exhibits on OAH prior to the hearing.

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 may not be admitted into evidence at the hearing unless it is supported by a declaration under penalty of perjury, and the ALJ rules that it is admissible.

6. Witnesses: Neither party shall be permitted to call any witnesses not disclosed under Education Code section 56505, subdivision (e)(7), or in the PHC, except for good cause shown, supported by declaration under penalty of perjury, and at the discretion of the ALJ.

Prior to the due process hearing, the parties shall meet and confer informally to discuss their witnesses and arrange a witness schedule. At the commencement of the hearing, the ALJ and the parties will discuss the witness schedules, including the length of time anticipated for examination of each witness and any scheduling issues for individual witnesses. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for any witness's testimony. 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. The parties shall proceed efficiently in their questioning of witnesses and shall narrow their witness lists and their questions to witnesses to avoid unnecessary, cumulative, or duplicative testimony. The parties should bear in mind that evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

All objections as to the relevance of the witnesses' testimony are reserved for hearing.

7. 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).) The District requested telephonic testimony for Regina Hedin, as she is recovering at home for a medical issue. The motion was granted. The District is ordered to provide copies of both

evidence binders to Ms. Hedin prior to her testimony. The parties are advised to make a motion for telephonic testimony prior to or at the hearing, should the issue for any further telephonic testimony arise.

8. Order of Presentation of Evidence: The District shall produce its evidence first. Where the District and Student intend to call the same witness to testify, the second party questioning the witness may ask questions that they would have asked on direct examination so the witness will only need to be called to the witness stand once. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination unless otherwise ordered.

9. Closed Hearing: Since the Student did not move for an open hearing, the hearing will be closed. The Student may request, in writing, to make the hearing open to the public at any time.

10. Motions: 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 this PHC.

11. Special Needs and Accommodations: There are none known at this time.

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 turned off during the hearing unless permission to the contrary is obtained from the ALJ.

13. Settlement: The parties are encouraged to negotiate to reach a settlement 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 business days or fewer before the due process hearing is scheduled to begin, the parties shall, in addition, immediately inform OAH of that fact during business hours by telephone at **(916) 263-0880**.

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. IF A FULL AND FINAL SETTLEMENT IS REACHED AFTER 5:00 P.M. ON THE LAST 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. OAH will check for messages the evening prior to the hearing and the morning of the hearing. If the settlement

agreement has been executed but is subject to approval of the school board, the parties may file a motion for OAH to vacate the prehearing conference and hearing dates and set a telephonic status conference for a date following board approval.

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

IT IS SO ORDERED.

Dated: September 10, 2013

/s/

MARGARET BROUSSARD
Administrative Law Judge
Office of Administrative Hearings