

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ANTIOCH UNIFIED SCHOOL DISTRICT.

OAH Case No. 2014020388

ORDER FOLLOWING PREHEARING
CONFERENCE AND SETTING DUE
PROCESS HEARING DATES

On August 11, 2014, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Adeniyi A. Ayoade, Office of Administrative Hearings. Natashe Washington, Attorney at Law, appeared on behalf of Student. Lenore A. Silverman and Maria Asturias, Attorneys at Law, appeared on behalf of the Antioch Unified School District. The PHC was recorded. Based on discussion of the parties, the ALJ issues the following order:

1. Hearing Dates, Times, and Location. The hearing shall take place on August 25-26, and September 2-4, 2014, and shall continue day to day, Monday through Thursday at the discretion of the ALJ until the hearing is concluded. The hearing shall be held at Antioch's offices located at 510 G. Street, Antioch, CA 94509. **The hearing shall begin at 9:00 a.m. and end at 5:00 p.m. each day, with the exception of August 25 when the hearing shall begin at 1:30 p.m., and September 2 when the hearing shall begin at 1:30 p.m., unless otherwise ordered.**

Antioch shall ensure that all facilities used during the hearing are compliant with the requirements of the Americans with Disabilities Act, and shall ensure that due process hearing location and room are appropriate for the hearing and accessible to all persons. In addition, the room shall meet OAH specifications, and at a minimum shall have separate tables capable of being moved into a courtroom configuration as follows: (1) one table for Student's representatives; (2) one table for Antioch's representatives; (3) one table for the ALJ with a nearby electrical outlet; and (4) one witness table. A room with one large conference table is not suitable. If a suitable location or room is not available for any of the hearing days, Antioch shall immediately notify OAH and the parties and propose a different location. Antioch is encouraged to make fresh water and tissue available in the hearing room at all times.

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 remaining issues at the due process hearing and the requested proposed remedies are as follows:¹

A. **ISSUES:**

- 1) During the 2012-2013 and 2013-2014 school years, did Antioch deny Student a free appropriate public education by failing to meet required standards for conducting an appropriate reevaluation of Student in the area of specific learning disability?
- 2) During the 2012-2013 and 2013-2014 school years, did Antioch deny Student a FAPE by failing to provide him with appropriate educational programs and interventions needed to address his anxiety disorder?
- 3) During the 2012-2013 and 2013-2014 school years, did Antioch deny Student a FAPE by failing to assess him in the area of assistive technology?
- 4) During the 2012-2013 and 2013-2014 school years, did Antioch deny Student a FAPE because Student failed to make a *de minimus* progress based on Antioch's testing?
- 5) During the 2012-2013 and 2013-2014 school years, did Antioch deny Student a FAPE by failing to write appropriate and measurable annual goals on any of his individualized education programs?
- 6) During the 2012-2013 and 2013-2014 school years, did Antioch deny Student a FAPE by failing to write appropriate transition plan or measurable annual goals for his post high school needs?
- 7) During the 2013-2014 school year, did Antioch deny Student a FAPE by failing to make a formal written individualized education program offer to Student?

¹ The issues at the due process hearing are those that were alleged in Student's due process complaint (complaint) as clarified at the PHC. As necessary, the issues have been clarified and reframed for clarity, as set forth herein below. Any issue(s) that is not listed and/or permitted by this order shall be included only with an amendment to a due process complaint. The amendment shall comply with California Education Code section 56502, subdivision (e). The filing of an amended complaint will restart the applicable timelines for a due process hearing. (20 U.S.C. § 1415(c)(2)(E)(ii).)

B. **PROPOSED REMEDIES.** As proposed resolution, Student requests an order from OAH directing Antioch to: 1) provide reimbursement of all educational costs to parents and provide 300 hours of one-on-one compensatory education and services (including therapies, training programs and camps for life skills and social skills training) – the compensatory services/education to be provided by a nonpublic agency of parent’s choice, to Student; 2) facilitate and provided transition plan and services for Student to address post high school needs for independence and employment; and 3) provide staff training in the area of appropriate transition services.

3. Timely Disclosure of Witnesses/Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits “at least” five business days prior to the hearing. The OAH’s scheduling order dated March 11, 2014, ordered the production of lists of all witnesses and documents by an earlier date, namely, at least three business days prior to this PHC. As of the date of the PHC, both parties have disclosed their witnesses and exhibits through their respective prehearing conference statements.

4. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. The parties may use numbers or letters to identify exhibits. If numbers are used by both parties, each party shall place the letter “S” or “D” in front of the exhibit to designate if it is a Student or Antioch’s exhibit (for example, 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. 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. Exhibit binders shall be exchanged five business days prior to the hearing in accordance with Education Code section 56505, subdivision (e)(7), unless the parties agree to a later date.

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 shall not be admitted into evidence at the hearing, unless good cause is shown as to why it was not previously exchanged. The parties shall be prepared to make such an offer of proof. The ALJ shall determine whether an exhibit is to be admitted into evidence. Only exhibits relevant to the issues previously stated in this order shall be admitted, unless used for impeachment purposes. The fact that an exhibit is placed in an exhibit binder does not guarantee its admission.

5. 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 disclosed in the party’s prehearing conference statement except for good cause shown, and at the discretion of the ALJ.

As of the day of the PHC, Student has identified and disclosed 21 witnesses (including five expert witnesses), and Antioch has disclosed 21 witnesses (including one expert witness). The parties are ordered to meet and confer regarding the schedule and order of witnesses. 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 irrelevant, repetitive, cumulative, or insufficiently probative to justify the time it would take to hear. Parties shall be prepared to make an offer of proof, if asked, as to why a specific witness' testimony is necessary. At the commencement of the hearing, each party shall provide the ALJ with a schedule of witnesses and a time estimate for each witness' direct and cross-examinations.

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. In the case of witnesses who have professional licenses and credentials, it is strongly recommended (but not ordered) that the party calling such witnesses be prepared to present copies of their *curriculum vita* (CV) or resume as exhibits, and exchange them with the other party.

6. Scope of Witness Examination. 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.

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).) Any party seeking to present a witness by telephone shall move in advance for leave to do so. Such party 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, 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.

8. Motions. Other than as included herein, no pretrial motions are pending. 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 15, 2014. At the PHC, the following motion were made and decided:

- i. **Order Dismissing Issues One and Two in Student's Amended Complaint.** During the prehearing conference, Student requested leave to withdraw Issues One and Two contained in the Amended Complaint dated February 13, 2014. Antioch has no opposition to the request, and the request to withdraw is granted. Accordingly, Issues One and Two, relating to: 1) whether Antioch denied Student a FAPE during the 2012-2013 and 2013-2014 school years by failing to provide him with appropriate programs, services and interventions needed to address his needs as a child with specific learning disability; and 2) whether Antioch denied Student a FAPE during the 2012-2013 and 2013-2014 school years because the Woodcock Johnson Achievement Test III used by

District to assess Student was not an appropriate assessment tool to assess Student, are dismissed. The issues set out above are those that remain and have been renumbered.

- ii. **Antioch's Motion To Continue the Due Process Hearing Dates.** During the prehearing conference, Attorney for Antioch requested that the due process hearing dates be continued due to the fact that she is unavailable on August 27-29, 2014 due family issues she must attend to in Los Angeles during those dates.² Student opposed the continuance request. After evaluating the arguments from both parties, and considering all relevant facts and circumstances, good cause is established for continuing the August 27 and 28, 2014 due process hearing dates in order to permit Ms. Silverman time to attend to her family needs.³ Accordingly, the due process hearing in this matter shall begin on August 25, 2014 as scheduled, but the August 27 and August 28, 2014 dates are vacated. The hearing shall resume on September 2, 2014, and continue day-to-day thereafter until completed.
- iii. **Order Granting Motion for Telephonic Testimony.** Student moved to have Marcie McCourtie testify by telephone due to ongoing medical issues involving Ms. McCourtie's family. District did not oppose the request. The question of whether a witness may appear by telephone is a matter within the discretion of the ALJ. (5 C.C.R. § 3082, subd. (g).) Based upon the information presented at the PHC, Student's motion to have Ms. McCourtie testify telephonically is granted. Student shall provide Ms. McCourtie with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and Student shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness,⁴ and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.
- iv. **Order Granting Student's Motion To Record Proceedings:** Student moved to be permitted to digitally record the due process hearing proceeding. Antioch does not oppose the motion. Permitting a party to record the hearing is

² The attorney recently lost her mother, and burial arrangements/ceremony are taking place in Los Angeles during the relevant time.

³ A due process hearing must be conducted and a decision rendered within 45 days of receipt of the due process notice unless an extension is granted for good cause. (34 C.F.R. § 300.515(a) & (c) (2006); Ed. Code, §§ 56502, subd. (f), 56505, subd. (f)(3); Cal. Code Regs., tit. 1, § 1020.) As a result, continuances are disfavored.

⁴ During the PHC, Antioch indicated that it would be able to provide a speakerphone for the hearing room..

a matter within the discretion of the ALJ. (1 C.C.R. § 1030, subd. (c).)
Student's motion is granted. Student's recording of the proceedings shall not interfere with the efficient administration of the hearing, or the fair and efficient conduct of it. Any recording made pursuant to this permission shall not be part of the official record, and OAH'S RECORDING WILL BE THE ONLY AND OFFICIAL RECORD FOR THE DUE PROCESS HEARING. In addition, Student agrees to turn off the recording whenever the ALJ and the parties are off the record.

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

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

11. 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. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

12. Special Needs and Accommodations. At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

13. Order of Presentation of Evidence: Student filed this matter. Therefore, Student shall produce his evidence first. Where Student and Antioch intend to call the same person to testify, each party will examine the witness immediately after the other party, so the witness will only need to be called to the witness stand once.

14. Hearing Opened To the Public. At the request of the Student, the hearing shall be opened to the public.

15. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. If the parties believe a mediator may assist them in settlement negotiations, they should submit a request for mediation as soon as possible. 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 BEFORE THE 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 FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE AT 916-376-6319.

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 and the morning of the hearing.

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

IT IS SO ORDERED.

DATE: August 15, 2014

/s/

ADENIYI AYOADE
Administrative Law Judge
Office of Administrative Hearings