

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

GLENDALE UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2014080039

ORDER FOLLOWING PREHEARING
CONFERENCE

On November 24, 2014, a telephonic prehearing conference was held before Administrative Law Judge Marian H. Tully, Office of Administrative Hearings. Carolyn J. Olson and Lisa Dennis, Attorneys at Law, appeared on behalf of Student. Debra K. Ferdman, Attorney at Law, appeared on behalf of Glendale 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 December 8, 9, 10 and 11, 2014, and shall continue day-to-day, Monday through Thursday, until completed, at the discretion of the ALJ. The hearing shall begin at 1:30 p.m. the first day of the hearing and at 9:00 a.m. all other days unless otherwise ordered.

The hearing shall take place at District's offices located at 223 North Jackson Street, Room 206B, Glendale, California 91206. District shall provide a facility for the hearing that 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 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 are listed below.

a) Did District deny Student a FAPE by failing to appropriately assess Student in his October 16, 2013, psycho-educational assessment?

b) Did District deny Student a FAPE by failing to provide adequate instruction and remediation in reading, Lindamood-Bell reading instructional services, and effective speech and language instruction?

c) Did District deny Student a FAPE by failing to provide an appropriate placement for the 2012-2013 and 2013-2014 school years?

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 exchange, and provide the ALJ a copy of, resumes or curriculum vitae 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 not later than 24 hours before the witness is scheduled to testify.

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 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 disclosed in the party’s prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

District agrees to make District witnesses available to Student without subpoena, and shall, on or before December 2, 2014, notify Student if any District witness on Student’s list is not available and provide contact information for the witness.

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 attempt to reach agreement on a witness list for the first day of hearing. The District 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 of each such witness is expected to take.

The witness schedule will be finalized at the commencement of the due process hearing.

5. 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. If a witness is to be called by more than one party, the party first conducting cross-examination of that witness shall include in that examination all questions intended for the witness on direct examination, in order that each witness need appear and testify 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; 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. Timely Disclosure of Witnesses/Exhibits. The parties have timely disclosed witnesses and exhibits as required by Education Code section 56505, subdivision (e)(7). Notwithstanding the requirements of Education Code section 56505: Student shall be permitted to amend Student's exhibit list to include educational records produced as ordered below in paragraph 9 b; Student shall file and serve an amended exhibit list, if at all, by noon on December 5, 2014; and copies of documents listed in the amended exhibit list shall be included in Student's evidence binders.

8. Order of Presentation of Evidence. As petitioner, Student will proceed first.

9. Motions.

a. Student's Motion to for Leave to Amend Complaint and District's Motion to Dismiss Issues Raised for the First Time in Petitioner's Prehearing Conference Statement.

On November 14, 2014, Student filed a Motion for Leave to Amend Complaint on the grounds that "new evidence has been discovered since Petitioner's original filing." No

proposed amended complaint was filed. On November 19, 2014, District filed an opposition. On November 21, 2014, District filed a Motion to Dismiss Issues Raised for the First Time in Petitioner's Prehearing Conference Statement. For the reasons set forth below, Student's Motion for Leave to File an Amended Complaint is denied.

An amended complaint may be filed when either (a) the other party consents in writing and is given the opportunity to resolve the complaint through a resolution session, or (b) the hearing officer grants permission, provided the hearing officer may grant such permission at any time more than five (5) days prior to the due process hearing. (20 U.S.C. §1415(c)(2)(E)(i).) The filing of an amended complaint restarts the applicable timelines for the due process hearing. (20 U.S.C. §1415(c)(2)(E)(ii).)

Student did not file a proposed amended complaint. "New evidence" is not grounds to file an amended complaint and without a proposed amended complaint, no new claims can be identified. Without a proposed amended complaint, and considering District's objections, the motion to amend is denied. OAH does not vacate agreed upon PHC and due process hearing dates in consolidated cases on the possibility that a timely amended complaint might actually be filed.

District's Motion to Dismiss Issues Raised for the First Time in Petitioner's Prehearing Conference Statement is moot. No amended complaint has been filed, and the motion to amend has been denied. The issues stated in paragraph 2 above are the issues contained in Student's complaint.

b. District's Motion to Quash SDT.

On November 12, 2014, Student served a subpoena duces tecum (SDT) by certified mail upon District and counsel that requested curriculum, teaching instructions, and assignments from an intensive reading program in place since February 26, 2014, and qualifications trainings, certificates and degrees held by the aide assigned to Student starting October 1, 2014. On November 14, 2014, District filed a motion to quash Student's SDT. Student responded to District's motion on November 18, 2014. On November 21, 2014, Student served another SDT by certified mail on District and counsel. The second SDT included five categories of documents, some of which would constitute educational records. Student's SDT's sought production of the described documents in order to prepare for the due process hearing. District moved to quash the second SDT. For the reasons set forth below, the motions to quash SDT's are granted.

In special education proceedings in California, "[t]he hearing officer shall have the right to issue Subpoenas (order to appear and give testimony) and Subpoenas Duces Tecum (SDT) (order to produce document(s) or paper(s) upon a showing of reasonable necessity by a party)." (Cal. Code of Regs., tit. 5, § 3082, subd. (c)(2).) This requirement mirrors that required by Code of Civil Procedure section 1985, subdivision (b) (Section 1985(b)), which requires:

A copy of an affidavit shall be served with a subpoena duces tecum . . . , showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control.

The good cause requirement is met by a factual showing of why the requested material is material and relevant to the litigated issues. (*Johnson v. Superior Court* (1968) 258 Cal. App.2d 829, 835-836; see also *Seven Up Bottling Company v. Superior Court* (1951) Cal. App.2d 71, 77.) Special education law does not specifically address motions to quash subpoenas or SDT's. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure, section 1987.1, which provides that a court may make an order quashing a subpoena entirely, modifying it, or directing compliance with it upon such terms or conditions as the court shall declare, including protective orders.

Parents may request copies of their child's educational records at any time, and are entitled to receive those copies within five business days of their request. (Ed. Code, § 56504.) Educational records under Education Code, section 56504, include assessments and assessment protocols that are personally identifiable to the child, and must be disclosed to the parents. (*Newport-Mesa Unified Sch. Dist. V. State of Calif. Dept. of Educ.* (C.D. Cal. 2005) 371 F.Supp.2d 1170, 1175.) Education Code section 49091.10, subdivision (a), permits a parent to inspect instructional materials, which include assessments and teacher's manuals. Education records under the IDEA are defined by the federal Family Educational Rights and Privacy Act (FERPA) to include "records, files, documents, and other materials" containing information directly related to a student, other than directory information, which "are maintained by an educational agency or institution or by a person acting for such agency or institution." (20 U.S.C. § 1232g(a)(4)(A); Ed.Code, § 49061, subd. (b).) Education records do not include "records of instructional, supervisory, and administrative personnel . . . which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute." (20 U.S.C. § 1232g(a)(4)(b)(i); Ed. Code, § 49061, subd. (b).)

The United States Supreme Court in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426 [122 S. Ct. 934, 151 L.Ed.2d 896] (*Falvo*), after conducting an analysis of FERPA provisions related to education records, determined that not every record relating to a student satisfies the FERPA definition of "education records." Specifically, the Supreme Court examined the FERPA provision that requires educational institutions to "maintain a record, kept with the education records of each student" (i.e., 20 U.S.C. § 1232g(b)(4)(A)), that "list[s] those who have requested access to a student's education records and their reasons for doing so." (*Falvo, supra*, 534 U.S. at p. 434.) The Court concluded that because this single record must be kept with the education records, "Congress contemplated that education records would be kept in one place with a single record of access." (*Id.*) The Court further concluded that "[b]y describing a 'school official' and 'his assistants' as the

personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar” (*Id.* at pp. 434-435.)

In *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, *aff’d*, *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653 (*S.A.*), the district court found that school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Because the emails student requested had not been placed in his permanent file, and were therefore not “maintained” by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the IDEA.

In addition to the parents’ right to copies of educational records within five business days of a request, a party to a due process proceeding is entitled to be served, five business days before the hearing, with copies of all the documents the other party or parties intend to use at the hearing, and a list of all witnesses intended to be called with a statement of the general areas of their expected testimony. (Ed. Code, § 56505, subd. (e)(7).)

Neither SDT is supported by affidavit. Both SDT’s seek pre-hearing discovery, a process not available in special education due process. The Education Code provides the method to be used to obtain educational records. Student represented during the PHC that Student had exercised the right to request educational records. District represented that educational records were provided to Student.

Due to the eleventh hour filing of the second SDT, District had not yet seen a copy of the SDT by the time of the PHC and was closed for the week due to the upcoming Thanksgiving holiday. District’s counsel agreed to review the documents listed in the SDT’s and to provide copies of listed educational records, if any, not previously provided, to Student on or before December 4, 2014.

c. Electronic Recording of Hearing.

Student’s counsel requested permission to make a personal audio recording for counsel’s use to prepare for hearing and closing argument. District objected. The sole and official record of the hearing is the OAH recording during the hearing. Each party may make a personal audio recording for counsel’s use in representing their party. The recording device will be turned on and off at the same time the ALJ goes on and off the record in order to avoid recording off the record conversations. Operation of the party’s recording device will not be allowed to delay the hearing. No delays will be allowed, or accommodations made, to facilitate personal recording.

No other 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 November 24, 2014.

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

11. 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. No recording of any kind except that permitted by paragraph 9 c. is permitted.

12. 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.

13. Special Needs and Accommodations. At present neither party requests special accommodation for any witness or party, or for translation services.

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>.

14. Hearing Open to the Public. At Parents' request the hearing will be open to the public. Any person disclosed on either party's witness list will be excluded from the hearing. Parents should be aware that by opening the hearing, District employees who are not witnesses, or other people who are unknown to Parents, may attend the hearing. The parties shall confer on or before December 1, 2014, as to the seating requirements for members of the public and notify OAH on or before 5:00 p.m. December 2, 2014, if the above location currently set for hearing cannot accommodate sufficient seating for the public. Student shall immediately notify District and OAH if Student becomes aware that there will be members of the media attending the hearing.

The parties are advised that the Student's request that the hearing be open to the public does not limit the authority of the ALJ hearing this matter to order closure of a hearing or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of the particular case, or for other purposes as set forth at Government Code,

section 11425.20. The ALJ may also exclude persons whose actions impede the orderly conduct of the hearing, restrict attendance because of the physical limitations of the hearing facility, or take other action to promote due process or the orderly conduct of the hearing. (Tit. 1, Cal. Code Regs., § 1030.)

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 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 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 submit a request for a status conference 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: November 24, 2014

/s/
MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings

