

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:	
PARENTS ON BEHALF OF STUDENT,	OAH Case No. 2015030954
v.	
TEHACHAPI UNIFIED SCHOOL DISTRICT,	
TEHACHAPI UNIFIED SCHOOL DISTRICT,	OAH Case No. 2015030934
v.	
PARENTS ON BEHALF OF STUDENT.	ORDER FOLLOWING PREHEARING CONFERENCE

On July 24, and July 27, 2015, a telephonic prehearing conference was held before Administrative Law Judge Laurie Gorsline, Office of Administrative Hearings. Andrea Marcus, Attorney at Law, and Vikki Rice, Paralegal, appeared on behalf of Student. Darren Bogie, Attorney at Law, appeared on behalf of Tehachapi Unified School District on July 24, and 27, 2015. Stacey Inman, Attorney at Law, and Heather Richter, District Director of Programs appeared on behalf of District on July 24, 2015. 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 July 30, and August 4, 5, 6, 11, 12, 13, and 18, 2015, and continue day to day, Monday through Thursday as needed at the discretion of the ALJ. The hearing shall begin each day at 9:00 a.m., with the exception of July 30, 2015, on which day the hearing shall begin at 9:30 a.m. unless otherwise ordered.

The hearing shall take place at the District's offices located at Tehachapi Unified School District, 300 South Robinson Street, Tehachapi, California 93561. District will ensure that parking is available for Student and her representatives and the ALJ.

District shall provide facilities that fully comply 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 and parties’ proposed resolutions are listed below.

District’s Issues:

- (1) Did District conduct an appropriate occupational therapy assessment of Student such that District is not required to provide Student with an independent educational assessment at public expense?
- (2) Did District conduct an appropriate speech and language assessment of Student such that District is not required to provide Student with an independent educational assessment at public expense?
- (3) Did District conduct an appropriate adaptive physical education assessment of Student such that District is not required to provide Student with an independent educational assessment at public expense?

District’s Proposed Resolutions:

- (1) A ruling that District’s occupational therapy, speech and language, and adaptive physical education assessments were appropriate and District is not required to fund independent educational evaluations in those areas.

Student’s Issues:¹

- (1) Did District deny Student a free and appropriate public education at the March 22, 2013, March 17, 2014, and December 18, 2014 (as continued to January 22, 2015, and February 3, 2015) independent educational program team meetings by failing to offer appropriate goals?

¹ Student’s first amended due process complaint alleges other issues. At the PHC, Student’s counsel represented to the ALJ that Student was withdrawing her other IDEA claims and that the only Student issues for hearing were those issues delineated in (1) through (4) below.

- (2) Did District deny Student a FAPE at the March 22, 2013, September 4, 2013, March 17, 2014, May 30, 2014 and December 18, 2014 (as continued to January 22, 2015, and February 3, 2015) IEP's by failing to offer appropriate services in the areas of:
 - a. Behavior support; and/or
 - b. Assistive technology?
- (3) Did District deny Student a FAPE by significantly impeding Parents' opportunity to participate in the decision making process by failing to provide to Parents appropriate documentation and communication regarding the use of restraints on Student in November 2014, and Student's injuries in connection with the following incidents: (i) the choking of Student in August 2013; (ii) Student's sunburn in 2014; (iii) Student's fat lip in September 2014; and (iv) Student's ingestion of narcotics in fall 2014?
- (4) Did District deny Student a FAPE at the December 18, 2014 (as continued to January 22, 2015 and February 3, 2015) IEP's by:
 - a. Significantly impeding Parents' opportunity to participate in the decision making process by predetermining placement; and
 - b. Failing to consider placement in the least restrictive environment.

Student's Proposed Resolutions:

- (1) Reinstatement of Student's one-to-one aide, funding of a full-time one-to-one behavior aide of Parents' choice and supervisory support for the aide;
- (2) Independent educational assessments;
- (3) Door-to-door transportation;
- (4) Funding for training and substitute personnel, the hiring of a qualified special education teacher and aide, and placement of cameras in the classroom;
- (5) Requiring written reports of Student's injuries within 24 hours;
- (6) Requirements and restrictions on the IEP's regarding timing, attendance, waivers, goals, and transition plans;

- (7) Payment for the one-to-one aide, aide supervisor and Student's counsel to attend IEP team meetings;
- (8) Speech therapy and social skills services, and identification of assistive technology equipment; and
- (9) Compensatory education.

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing. Except as permitted herein or otherwise ordered by the ALJ, 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 July 28, 2015** to delete duplicate exhibits from the exhibit binders.

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, subd. (e)(7), the parties shall exchange resumes and curriculum vitae, if any, not later than **July 29, 2015**.

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, subd. (e)(7), District shall serve a copy of the school calendar(s) on Student **by July 29, 2015** and include the school calendar(s) in the binders provided for use by the witnesses and the ALJ.

Excerpts of an audio record of an individualized education program team meeting 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.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit 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, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. 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.

The parties shall comply with Education Code section 56505 (e)(7). No 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 shall meet and confer **by July 28, 2015**, 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.

Each witness will only be called once to testify, except for rebuttal purposes, and all parties shall examine the witness when the witness is first called. 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 each witness is expected to take.

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 such evidence. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony.

5. Order of Presentation of Evidence. This matter is consolidated, and involves two parties. 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 on her first amended complaint and District is the petitioning party on its complaint. The order of presentation of evidence shall be as follows: Student shall present its case in chief, followed by District. If a witness is to be called by more than one party, each party shall ask questions of the witness so that the witness does not need to return for testimony.

6. Telephonic Testimony. Student's motion to have Dr. David Gilbertson testify by telephone was denied without prejudice at the PHC on the grounds that Student failed to establish that Dr. Gilbertson was unavailable to testify in-person during the hearing. Student may renew her motion prior to or on the first day of hearing.

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. Prior to the hearing, the proponent of the witness shall provide the proposed witness with a complete set of duplicate exhibit binders from all parties, containing all exhibits from each party, and instruct the witness not to remove any documents from the exhibit binders. The hearing room shall have sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. Unless otherwise ordered, the witness shall testify on a land-line telephone while alone in a private room. No witness will be heard by telephone unless all these requirements have been fulfilled.

7. Motions. District's Motion to Quash filed on July 23, 2015, was argued and granted at the PHC. Student's subpoena served on July 22, 2015, which required production of documents on July 22, 2015, was quashed. To the extent the subpoena required the production of Student's educational records, if any, District's counsel was ordered to contact the subpoenaed party to determine if the subpoenaed party possesses such educational records, and use his best efforts to obtain such educational records, if any, and produce them to Student's counsel by July 29, 2015. In addition, by July 28, 2015, District's counsel shall inform Student's counsel as to the status of obtaining educational records, if any, from the subpoenaed party.

At present no other prehearing motions are pending or contemplated. Any prehearing motion filed after the prehearing conference shall be supported by a declaration under penalty of perjury establishing good cause why the motion was not made prior to or at the prehearing conference.

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

The parties shall meet and confer **by July 28, 2015** to determine legal and factual stipulations, if any, to be submitted at hearing.

9. 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. There shall be no texting permitted while the hearing is in session.

The ALJ shall record the hearing and the ALJ's recording is the only official record of the hearing. No person shall record or photograph the proceedings unless otherwise permitted by the ALJ.

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. Special Needs and Accommodations. At present neither party anticipates the need for 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 the need is made known. Additional information concerning requests for reasonable accommodations is available on OAH's website at <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>.

12. Hearing Open To the Public. At the request of Parent, the hearing will be open to the public. With the exception of Parent, Student and District's representative, witnesses shall be excluded from the hearing room until such time as the witnesses' testimony, including rebuttal testimony, has been completed.

13. 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.

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

IT IS SO ORDERED.

DATE: July 27, 2015

/s/

LAURIE GORSLINE
Administrative Law Judge
Office of Administrative Hearings