

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

WINTERS JOINT UNIFIED SCHOOL
DISTRICT AND DAVIS JOINT UNIFIED
SCHOOL DISTRICT.

OAH Case No. 2015080259

ORDER FOLLOWING PREHEARING
CONFERENCE; SETTING DATES;
CLARIFYING ISSUES; AND,
DENYING REQUEST TO BIFURCATE

On October 16, 2015, a telephonic prehearing conference was held before Administrative Law Judge Joy Redmon, Office of Administrative Hearings. Mother appeared on Student's behalf. Attorney Jan Tomskey represented Winters Joint Unified School District. Attorney Jennifer Fain represented Davis Joint 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 due process hearing will take place at Winter's offices located at **909 West Grant Avenue, Winters, CA 95694**. During the PHC, the hearing was set to take place on Thursday, October 22, 2015, beginning at 9:30 a.m.; on Friday, October 23, 2015, beginning at 10:00 a.m.; and if necessary on Monday, October 26, 2015, from 9:00 a.m. until noon.¹ After the PHC concluded, the undersigned ALJ was reminded that OAH is not holding hearings on Monday, October 26, 2015, due to a statewide training. Accordingly, October 26, 2015, is cancelled as a hearing day and if additional days are necessary the matter will continue on Tuesday, October 27, 2015, at 9:00 a.m. and day to day thereafter, Monday through Thursday, at the discretion of the ALJ. **Following the PHC, the matter was reassigned to ALJ Rebecca Freie.**

¹ Winters specifically requested, and the other parties agreed, to add Friday, October 23, 2015, as a hearing date asserting it is more efficient to hold the hearing on consecutive days based on the representation that the hearing will likely conclude in two days. Mother's request for a 10:00 a.m. start time on Friday, October 23, 2015, due to a previously scheduled obligation was unopposed by Winters and Davis and was granted. If another ALJ is assigned to hear this matter, that ALJ has the discretion regarding proceeding on Friday, October 23, 2015, as scheduled. The additional half day was added out of an abundance of caution and also to accommodate a witness conflict that exists for one of Davis' primary witnesses who is no longer an district employee.

Winters, as the named local educational agency providing the hearing location, 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. Winters is ordered to certify that it will provide a facility that complies with the law by Tuesday, October 20, 2015.

Prior to the beginning of the hearing, Winters shall assist the ALJ to ensure that the hearing room is configured into a courtroom setting, including (1) a table for Student and his representatives; (2) a separate table for Winter's and Davis's legal counsel and special education representatives; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. District shall also make reasonable effort to ensure that drinking water and tissue are available to all parties, witnesses, and the ALJ.

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 the proposed resolutions, are listed below.

Issues against Davis:

Issue 1: Did Davis deny Student a free appropriate public education by failing to conduct a legally compliant speech and language assessment in February 2014 specifically regarding the accuracy and authenticity of one test protocol because three different inks appear in the document?

Issue 2: Did Davis deny Student a FAPE by failing to conduct a legally compliant academic achievement assessment because the test protocol dated January 21, 2014, is incomplete and contains another student's name?

Issues against Winters:

Issue 1: Did Winters fail to offer Student a FAPE in the February 14, 2014, individualized education program by failing to:

- a. include present levels of academic achievement and functional performance;
- b. include annual measurable goals relating to the special education services offered;

- c. include objective strategies to evaluate progress toward goals;
- d. include a description of how progress toward meeting annual goals would be measured;
- e. include a statement of when progress reports would be provided;
- f. consider less restrictive placement options than a special day class;
- g. offer an appropriate placement in the least restrictive environment; and
- h. provide a means by which to measure whether or not Student would obtain educational benefit?

Issue 2: Did Winters fail to offer Student a FAPE in the April 14, 2015, IEP by failing to:

- a. consider Student's privately obtained reading assessment;
- b. offer Student one-to-one instruction as proposed by an independent assessor; and
- c. include the name of the specific reading program that would be provided?

Proposed Resolutions: Student seeks tuition reimbursement, tutoring reimbursement, prospective tuition through high school, prospective educational tutoring, reimbursement and prospective mileage, compensatory education for speech and language services and cost for supplies and mailings.

Affirmative Defense: Winter's raises as an affirmative defense that at all times alleged herein Student was a unilaterally placed private school student not entitled to a FAPE because he elected to receive services through an ISP in Davis rather than any or all services offered in Winter's IEP's.

Procedural Matter regarding Issues: Student alleged in his amended complaint (identified as issue 11) that Davis denied him a FAPE by failing to make an appropriate placement recommendation. During the PHC, the undersigned ALJ identified this as an issue in the complaint. Davis moved to strike this issue asserting that this issue was stricken in ALJ Hohensee's October 15, 2015 Order (1) Granting Request for Reconsideration and (2) Granting in Part and Dismissing in Part Davis's Motion to Dismiss Portions of Student's First Amended Complaint. The undersigned ALJ overruled Davis's motion based on the fact that Judge Hohensee's order specifically preserved issue 11.

Following the PHC, the undersigned ALJ again reviewed the October 15, 2015 Order and is reconsidering the ruling made during the PHC sua sponte. Although ALJ Hohensee's October 15, 2015 Order preserved Issue 11 against Davis, a prior finding in the order makes clear that she only preserved the allegations in Issue 11 regarding assessments and not the placement recommendation. Specifically, on page 4 of the Order in the discussion regarding Issue 1 of Student's first amended complaint it states that, "[s]tudent's allegations that Davis 'promulgated' or authored an IEP offer of FAPE as a result of hosting the IEP team meeting at one of its schools has no support in the IDEA, which limits Davis' obligation to holding the IEP team meeting to determine Student's eligibility, and places the obligation to determine Student's educational needs and make an offer of FAPE on Winters, Student's school of residence." Based upon this finding in ALJ Hohensee's October 15, 2015 Order, the undersigned ALJ is dismissing Student's issue regarding Davis's failure to make an appropriate placement recommendation and it is not included in the issues for hearing identified above.

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. Student shall place the letter "S" in front of the exhibit to designate if it is a Student exhibit. In this case, Davis will be designated as "D" and Winters will be designated as "WD." 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.²

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. The parties shall be permitted to call witnesses not properly disclosed to the other party except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

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.

² Student previously served his exhibits on OAH. They are being returned to Student and shall be brought to hearing by Student.

The parties were order to confer prior to hearing a present a proposed witness list on the first day of hearing. The Districts shall have witnesses available in case agreement on a witness list is not reached. Prior to the commencement of 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. 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. The order in which the parties present their cases in chief shall be subordinate to the need for each witness to appear 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.

Davis requested to either have Ms. Newman testify out-of-order or telephonically because she is no longer a Davis employee and will be out of town on October 22, 2015, and may not have returned by October 23, 2015. The request was granted conditioned upon the requirements outlined above.

7. Electronic Recording of Hearing.

a. Audio Recording. Davis's motion to make an audio recording of the hearing is granted, subject to the following conditions: 1) that OAH's recording is the only official recording; 2) that the recording will be turned on and off at the same time as the ALJ's recording, in order to avoid recording conversations while off the record; and 3) that operation of the party's recording mechanism will not be allowed to delay the hearing.

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 its case-in-chief, followed by Davis, and then Winters.

9. Motions.

Motion to Bifurcate: Winters made a motion to bifurcate the issue raised in its affirmative defense that at all times alleged herein that Student was a parentally placed private school student not entitled to a FAPE because he elected to receive services pursuant to an ISP in Davis.

The federal and state law pertaining to special education due process administrative proceedings does not contain a specific reference to the procedure of bifurcating issues for trial. While certain sections of the Administrative Procedures Act do not apply to special education proceedings, OAH looks to them for guidance. Pursuant to the APA, such authority resides in the discretion of the ALJ, provided the separate hearings are conducive to judicial economy or efficient and expeditious use of judicial resources. (See Gov. Code, § 11507.3, subd. (b).)

Generally OAH will only bifurcate a hearing when the resolution of a threshold question will determine whether pending issues remain to be determined. In such a situation, bifurcation furthers judicial economy. In this case, there are two respondents. If the matters were bifurcated and Winter's were to prevail it would not eliminate the need for a hearing as issues related to Davis would survive. Additionally, the issues in this case are narrowly pled and each witness proposed by Davis is also included in Winter's witness list. Considering all of these factors, the ALJ determined that bifurcation in this cause would not promote judicial economy or the efficient and expeditious use of judicial resources. Accordingly, the motion to bifurcate was denied.

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 October 16, 2015.

10. 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.

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, Parties, and Witnesses 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. No request for accommodations was made. 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: <http://www.dgs.ca.gov/oah/Home/Accommodations.aspx>

14. Hearing Open To the Public. At the request of Student, the hearing will be open 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 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.

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

IT IS SO ORDERED.

DATE: October 16, 2015

/s/

JOY REDMON

Administrative Law Judge

Office of Administrative Hearings