

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

HOLLISTER SCHOOL DISTRICT.

OAH Case No. 2015070707

ORDER FOLLOWING PREHEARING
CONFERENCE

On October 23, 2015, a telephonic prehearing conference was held before Administrative Law Judge Theresa Ravandi, Office of Administrative Hearings. David H. Tollner, Attorney at Law, appeared on behalf of Parents and Student. Attorney Amanda K. O'Neal was also present. Sarah L. Garcia, Attorney at Law, appeared on behalf of Hollister 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 hearing shall take place at Hollister's District office located at 2690 Cienaga Road, Hollister, California, 95023, on November 3, 2015, at 9:30 a.m., November 4-5, 2015, at 9:00 a.m., November 9, 2015, at 1:30 a.m., November 10, 2015, at 9:00 a.m., and November 12, 2015, at 1:30 p.m., and continuing day to day, Monday through Thursday, at the discretion of the ALJ.¹

The named local educational agency was to 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 et seq.), the Unruh Civil Rights Act (Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities. The named local educational agency has not yet certified that it will provide a facility for this case that complies with the law. The local educational agency shall inform OAH within two business days that it is able to certify that it will provide a facility that complies with the law.

¹ The parties were advised to have witnesses available in the event the ALJ is available for hearing on Friday, November 6, and 13, 2015. On the first day of hearing, the parties will be advised of the ALJ's Friday availability as well as whether the ALJ will be available to start hearing Monday, November 9, 2015, and Thursday, November 12, 2015, at the earlier start time of 9:00 a.m. In the event this matter does not conclude the week of November 9, 2015, this matter will not be in session the week of November 16, 2015, due to the unavailability of Hollister's counsel. The ALJ estimated that given the issues in this matter, the hearing should be concluded within five to six days.

Prior to the beginning of the hearing, Hollister 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 table for Hollister's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Hollister 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.

Issue One: From November 18, 2013, through March 4, 2014, did Hollister deny Student a free appropriate public education regarding Student's November 18, 2013 individualized education program by failing to offer and provide:

- a. appropriate behavioral supports and services;
- b. appropriate counseling services;
- c. an appropriate educational placement and appropriate academic support services; and
- d. extended school year services?

Issue Two: Did Hollister deny Student a FAPE by failing to implement his November 18, 2013 IEP as follows:²

- a. failing to implement occupational therapy services;
- b. failing to implement individual and small group instruction;
- c. failing to implement visual supports; and
- d. failing to implement consultation and collaboration among specialists, Parents, and general preschool staff?

² This issue is listed as framed by Student in his PHC statement. During the PHC, the ALJ and the parties discussed limiting this issue to the 2013-2014 school year. The parties will need to establish at hearing when the November 2013 was no longer Student's operative IEP.

Issue Three: From March 5, 2014, through May 6, 2014, did Hollister deny Student a FAPE regarding Student's March 5, 2014 IEP by failing to offer and provide:

- a. appropriate behavioral supports and services;
- b. appropriate counseling services;
- c. an appropriate educational placement and appropriate academic support services; and
- d. extended school year services?

Issue Four: From May 7, 2014, through September 23, 2014, did Hollister deny Student a FAPE regarding Student's May 7, 2014 IEP by failing to offer and provide:

- a. appropriate behavioral supports and services;
- b. appropriate counseling services;
- c. an appropriate educational placement and appropriate academic support services;
- d. appropriate speech and language services;
- e. appropriate occupational therapy services and sensory supports; and
- f. extended school year services?

Issue Five: From May 7, 2014, through the extended 2014-2015 school year, did Hollister deny Student a FAPE by failing to implement the May 7, 2014 IEP regarding minimum days?

Issue Six: From September 24, 2014, through the 2014-2015 school year, did Hollister deny Student a FAPE by:

- a. failing to offer and provide appropriate behavioral supports and services;
- b. failing to offer and provide appropriate counseling services;
- c. failing to offer and provide an appropriate educational placement and appropriate academic support services;
- d. failing to offer and provide appropriate speech and language services;

- e. failing to offer and provide appropriate occupational therapy services and sensory supports;
- f. failing to offer and provide an appropriate behavior support plan; and
- g. modifying Student's schedule unilaterally by reducing his hours to a minimum day without an IEP team meeting?³

Issue Seven: Did Hollister deny Student a FAPE by failing to timely file for a due process hearing to defend its November 2013 psycho-educational assessment, May 2014 occupational therapy assessment, and September 2014 psycho-educational assessment, or timely fund independent psycho-educational and occupational therapy evaluations pursuant to Parents' January 15, 2015 request?

Proposed Resolutions: Student seeks: 1) reimbursement for: costs associated with all private placements and services including placement at Learning Springs for the 2015 extended school year; services of an ABA-trained one-to-one behavior aide; and costs for the independent educational evaluation from Pratt Center; 2) compensatory education from November 2013 through May 2015, including placement at Learning Springs for the 2015-2016 school year; 3) psychotherapy services with a provider chosen by Parents; 4) occupational therapy by a non-public agency; 5) increased speech and language services; 6) school and home-based counseling; and 7) transportation.

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.

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 the ALJ rules that it is admissible.

³ During the PHC it appeared Student intended to include the extended school year for the timing of the issue as well as the failure to provide extended school year services. The issue stands as framed by Student in his PHC statement. The parties shall immediately inform the ALJ in writing if they believe this PHC order does not reflect the discussions held during the PHC with specific references to Student's complaint.

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 timely disclosed except for good cause shown, 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. Student has identified 36 witnesses but plans to narrow this list. Hollister has identified 39 witnesses, 18 of whom are shared witnesses, for a total of 57 witnesses. Given the allotted hearing time and the large number of witnesses, the parties are ordered to meet and confer by October 28, 2015, as to the schedule of witnesses and projected length of direct and cross examination.

At the start of the hearing, the parties shall present a proposed joint schedule of witnesses for the entire hearing, with time estimates. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony, to ensure that this matter is concluded within the time allotted, based upon the parties' time estimates as well as on the issues presented.

5. Order of Presentation of Evidence and Scope of Witness Examination. 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 has the burden of proof. Student shall present his evidence first, followed by Hollister. 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.

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. Neither party requested telephonic testimony.

7. Electronic Recording of Hearing.

a. Audio Recording. Student and Hollister's motions to make an audio recording of the hearing was 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. Motions. No 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 23, 2015.

9. 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.

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.

12. Special Needs and Accommodations. A party or participant to this case, such as a witness, requiring reasonable accommodation to participate in the 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>.

At present neither party anticipates the need for special accommodation for any witness or party, or for interpreter services.

13. Hearing Closed To the Public. At the request of Student, the hearing will be closed to the public.

14. 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.

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

IT IS SO ORDERED.

DATE: October 23, 2015

/s/

THERESA RAVANDI
Administrative Law Judge
Office of Administrative Hearings