BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

IN THE MATTER OF:

PARENT ON BEHALF OF STUDENT,

v.

FRESNO COUNTY SUPERINTENDENT OF SCHOOLS, GOLDEN PLAINS UNIFIED SCHOOL DISTRICT, AND KERMAN UNIFIED SCHOOL DISTRICT.

OAH CASE NUMBER 2020070315

ORDER FOLLOWING PREHEARING CONFERENCE FOR HEARING BY VIDEOCONFERENCE, DENYING MOTION TO COMPEL, AND DENYING MOTION FOR OFFICIAL NOTICE

NOVEMBER 18, 2020

On November 16, 2020, Administrative Law Judge Tara Doss of the Office of Administrative Hearings, held a prehearing conference by videoconference. The Administrative Law Judge is called an ALJ. The Office of Administrative Hearings is called OAH. The prehearing conference is called a PHC.

Parents appeared on behalf of Student. Attorney Jennifer Rowe Gonzalez appeared on behalf of Fresno County Superintendent of Schools. Attorney Daniel Lowe appeared on behalf of Kerman Unified School District. Attorney Dee Anna Hassanpour appeared on behalf of Golden Plains Unified School District. OAH recorded the PHC. Based upon discussion with the parties, the ALJ issues the following order:

HEARING DATES, TIMES, AND LOCATION

DUE PROCESS HEARING

The hearing will take place on December 1, through 3, 2020, and continue day to day at the discretion of the ALJ. The hearing will begin at 9:30 AM each day, and generally end at 3:30 PM, unless otherwise ordered. The parties anticipate it will take eight days to complete the hearing. The parties have requested additional hearing dates of December 4, 14, and 16, through 18, 2020. Additional hearing dates will be discussed and confirmed with the ALJ during the hearing.

HEARING LOCATION

OAH is authorized to conduct due process hearings by videoconference or telephone. (Cal. Code Regs., tit. 5, § 3082, subd. (g).) Based on state and federal guidance to address safety procedures due to the novel coronavirus, COVID-19, OAH will conduct the due process hearing by videoconference using the Microsoft Teams application. Unless otherwise ordered, participants are required to appear by videoconference using a webcam and Microsoft Teams.

The parties must immediately notify all potential witnesses of the hearing dates, and must subpoena witnesses, if necessary, to ensure that the witnesses will appear to

testify. A party's failure to notify or subpoena a witness to testify will not be considered good cause to continue the hearing.

Instructions for issuing and responding to subpoenas and optional forms for subpoenas can be found on the website at https://www.dgs.ca.gov/OAH/Case-Types/Special-Education/Forms/Subpoenas?search=special%20education%20subpoena.

ISSUES AND PROPOSED RESOLUTIONS

The issues at the due process hearing, and proposed resolutions, as alleged in the complaint and clarified by the parties and the ALJ during the PHC are listed below. A free appropriate public education is called a FAPE. An individualized education program is called an IEP.

ISSUES

1. Did Fresno County, Golden Plains, and Kerman deny Student a FAPE from July 9, 2018, through July 9, 2020, by failing to:
    a. conduct a reevaluation in response to Student's extreme behavioral challenges;
    b. offer social skills and behavior deficit training to Student;
    c. offer appropriate mental health counseling from March 2019, to July 9, 2020;
    d. offer placement in the least restrictive environment as a result of using unnecessary restraint and seclusion methods; and
    e. allow Parents an opportunity to meaningfully participate in the IEP process?
2. Did Fresno County, Golden Plains, and Kerman deny Student a FAPE in the May 7, 2019 IEP, by failing to offer:

a. appropriate and measurable goals, objectives, and baselines;
b. appropriate speech and language services;
c. appropriate behavior services; and
d. appropriate strategies for "response to problem behavior" in Student's behavior intervention plan?

3. Did Fresno County, Golden Plains, and Kerman deny Student a FAPE in the May 7, 2020 IEP, by failing to offer appropriate:
   a. measurable goals, objectives, and baselines;
   b. speech and language services;
   c. behavior services;
   d. health and nursing services;
   e. transition services;
   f. psychological services; and
   g. vision services?

PROPOSED RESOLUTIONS

The resolutions requested by Student include staff training to Fresno County, Golden Plains, and Kerman on the laws and use of seclusion and restraint of children with disabilities in their care, and any other appropriate relief.

Fresno County filed its response to Student's complaint on November 16, 2020. Golden Plains filed its response to Student's complaint on September 14, 2020. Kerman filed its response to Student's complaint on November 10, 2020. (*M.C. v. Antelope Valley Unified School Dist.* (9th Cir. 2017) 858 F.3d 1189, 1199-1200.)

EXHIBITS

The parties must upload their exhibits electronically according to the Order Setting Procedures for Filing Exhibits Electronically.

The parties must serve their exhibits on each other in compliance with Education Code section 56505, subdivision (e)(7). Timely uploading electronic hearing exhibits five business days before the first day of hearing constitutes that party's timely exchange of evidence on each other in compliance with Education Code section 56505, subdivision (e)(7).

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not timely exchanged as required by Education Code section 56505, subdivision (e)(7) will not be admitted into evidence at the hearing unless the ALJ rules that it is admissible.

IDENTIFYING EXHIBITS AND PAGE NUMBERS

Each exhibit must be identified by a letter and number. Student must use the letter S before the number to identify Student's exhibits. Fresno County must use the letters FC before the number to identify its exhibits. Golden Plains must use the letters GP before the number to identify its exhibits. Kerman must use the letter K before the number to identify its exhibits. If Fresno County, Golden Plains, and Kerman decide to combine their exhibits, they must use the letter D before the number to identify their combined exhibits. For example, S-1 means Student's exhibit 1 and D-1 means Fresno County, Golden Plains, and Kerman's exhibit 1. A cover sheet with this identifying letter and number should be the first page of each exhibit. The electronic evidence program will automatically number the exhibits and additional page numbering or bates stamping should not be added.

CONTENT

Each exhibit must consist of one document. Separate documents may not be combined into one exhibit. Emails or letters may be consolidated into one exhibit if they are part of a single chain of messages. Exhibits should be in chronological order.

Parties should include resumes or curriculum vitae for each witness who is expected to testify as an expert.

Fresno County, Golden Plains, and Kerman's exhibits must include a copy of the school calendar for each school year in question.

Electronic copies of exhibits filed with OAH must be filed by 5:00 PM, at least five business days before the first day of hearing. OAH will issue a separate Order Setting Procedures for Filing Exhibits Electronically that includes instructions for how to file exhibits electronically. Beginning three days before the hearing, the electronic evidence system will not allow parties to upload exhibits. To upload exhibits after this time, a party must request permission from the ALJ at the hearing. The ALJ has discretion to grant or deny the party's request.

WITNESSES

The parties must serve their list of witnesses on each other in compliance with Education Code section 56505. No party will 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.

Parties are responsible for ensuring that all participants are familiar with and follow the Instructions for Joining the Online Due Process Hearing provided with this Order. Participants that have not previously used the Microsoft Teams application, may

also find informative videos available like the one at this link from Microsoft: https://support.office.com/en-us/article/join-a-teams-meeting-078e9868-f1aa-4414-8bb9-ee88e9236ee4.

The parties are responsible for ensuring that witnesses join the virtual hearing room at the designated date and time to testify. Witnesses are required to join the due process hearing by computer and appear by videoconference unless they do not have the necessary computer equipment. If a witness does not have the necessary equipment, the ALJ may permit the witnesses to appear by audio only or by telephone. "Audio only" means using a computer without webcam. Witness ability to attend the hearing by videoconference will be discussed at the start of the hearing.

The parties are responsible for producing their own witnesses unless otherwise ordered by the ALJ. Parties must make witnesses under their control reasonably available. The parties must schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party will be permitted to call any witnesses not timely disclosed, except for good cause shown, and at the discretion of the ALJ.

The ALJ has discretion to limit the number of witnesses and the time allowed for witness testimony. Education Code, section 56505.1, subdivision (h), empowers the ALJ to set a reasonable limit on the length of the hearing after consideration of four factors. The first two factors are the issues to be heard, and the complexity of facts to be proven. The second two factors are the ability of the parties or their representatives to present their respective cases, and the parties' estimates of the time needed to present their cases.

MEET AND CONFER

The parties are encouraged to review and shorten their witness and exhibit lists before the hearing. Evidence may be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would take to hear.

The parties are ordered to meet and confer no later than November 24, 2020, at 5:00 PM, to discuss scheduling witnesses and how much time each witness will take. The parties must discuss any issues related to counsel and witnesses appearing for hearing by videoconference and electronically viewing exhibits during the hearing. The parties must also discuss subpoenas, if any. The parties should attempt to eliminate duplicate exhibits from their hearing exhibits. The parties must discuss whether they can produce a written stipulation as to pertinent facts, contentions, resolutions, and authenticity and admissibility of documents, to shorten the length of time needed for the hearing.

As part of the meet and confer process, Fresno County, Golden Plains, and Kerman must inform Student which proposed witnesses are their respective employees. Fresno County, Golden Plains, and Kerman must also identify the witnesses on Student's list that require a subpoena. Fresno County, Golden Plains, and Kerman may agree to accept service for witnesses under their respective control or provide Student with the witnesses' most recent contact information.

PARTICIPANT INFORMATION FORM

All parties have an ongoing obligation to ensure that OAH has current information on the Participant Information Form filed with OAH and must file an updated form as necessary. The Participant Information Form is not served upon the opposing party or parties. The ongoing obligation to ensure the Participant Information

Form filed with OAH is current does not change the parties' statutory obligation to timely disclose their witnesses to the other parties at least five business days before hearing. The parties must file an updated Participant Information Form to inform OAH of any changes, additions, or deletions, including the required information no later than 5:00 PM, at least two business days before the first day of hearing.

Any contact information provided must be used for the limited purpose of issuing subpoenas or for contacting witnesses to attend the hearing and must not be disclosed to any other person.

EVIDENCE PRESENTATION

In an administrative proceeding, the burden of proof is ordinarily on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62.) In this case Student requested the hearing and bears the burden of proof. Student's case-in-chief will be presented first, followed by Fresno County, Golden Plains, and Kerman, unless otherwise ordered.

WITNESS LISTS

The parties must provide a joint proposed witness schedule to the ALJ on the first day of hearing. The schedule should include the first and last name of the witness, which party or parties are calling the witness to testify, and include the date of testimony and a time estimate of each witness's expected testimony. In the event an agreement cannot be reached, each party must prepare a separate written schedule. Student must have witnesses available in case there is no agreement.

At the beginning of the hearing, the ALJ and the parties will discuss the length of time anticipated for each witness and any scheduling issues for individual witnesses.

The ALJ will finalize the witness schedule. Parties must be prepared at the end of each day to discuss the witnesses to be presented the next day and the estimated time for each witness's testimony.

SCOPE OF WITNESS EXAMINATION

Each witness will be called to testify only once, except for rebuttal purposes. All parties must examine witness on all issues when the witness is first called. Requiring a witness to appear only once takes priority over the order in which parties present their case-in-chief.

AUDIO ONLY OR TELEPHONIC TESTIMONY

Whether a witness may appear by audio only or telephone instead of videoconference 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 audio only or telephone must request permission to do so before the hearing. Any party seeking to present a witness who cannot access exhibits electronically must inform the ALJ at the beginning of the hearing.

ELECTRONIC RECORDINGS

AUDIO RECORDING

A party may request permission to make an audio recording of the hearing. Permission to make an audio recording is subject to the ALJ's discretion and based upon certain conditions. The conditions are:

- the OAH recording is the only official recording;
- participants must not use Microsoft Teams to record the hearing;

- the parties must turn their recording device on and off while the ALJ is on and off the record, to avoid recording conversations while off the record;
- operation of a party's recording mechanism will not be allowed to delay the hearing;
- a party's recording may not be given or provided to, or played for a witness or potential witness;
- the recording is subject to the same confidentiality as the due process hearing;
- use of the chat function in the videoconference is prohibited and will not be part of the official record; and
- participants cannot take screenshots of the videoconference, or share or publish any portion of the videoconference or audio recording.

All parties may audio record the hearing subject to these conditions.

VIDEO RECORDING

No party, witness, or anyone else may make any video recording of any part of the proceedings or stream live through any means.

COMPENSATORY EDUCATION OR REIMBURSEMENT

Any party seeking reimbursement for expenditures must present admissible evidence of these expenditures, or a stipulation to the amount of the expenditures. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education. Documents offered as evidence to support a request for reimbursement must be separated by vendor.

MOTIONS

MOTION TO COMPEL AND SANCTION TO SHIFT EXPENSES

On November 10, 2020, Student filed a Motion to Compel and Sanction to Shift Expenses to Respondents. Specifically, Student seeks as order to compel Fresno County, Golden Plains, and Kerman to release the last known address and phone number for several witnesses on Student's witness list. Student also argues the public agencies acted in bad faith by not providing Student with this information, and as a result, seeks an order for sanctions to shift the expenses of subpoenaing witnesses to them. Kerman did not respond to Student's motion.

On November 12, 2020, Golden Plains filed an opposition to Student's motion on several grounds. First, Golden Plains argues the witnesses for whom Student seeks information were at no time employees of Golden Plains. Second, Golden Plains argues that Student's motion mischaracterizes facts and makes false claims regarding Golden Plains. Third, Golden Plains argues OAH does not have the legal authority to compel the production of witnesses or evidence sooner than five business days before hearing. Finally, Golden Plains argues sanctions are not warranted because it has not acted in bad faith or in a way to harass Parents.

On November 16, 2020, Fresno County filed an opposition to Student's motion on several grounds. First, Fresno County argues sanctions are not warranted because its actions in this case have not been in bad faith, frivolous, or solely to cause undue delay. Second, Fresno County argues it has no affirmative action to make witnesses available in Student's prehearing conference statement without Student requesting it to do so. Third, Fresno County argues it cannot make witnesses available that it has no control over, or who it does not employ.

There are no formal prehearing discovery procedures in special education due process cases. However, California Education Code, section 56505, grants parties the right to confront, cross-examine, and compel the attendance of witnesses, and the right to receive from the other parties, at least five days before the hearing, a list of witnesses and the general area of testimony that the party intends to present at hearing. Student did not cite to any legal authority that requires public agencies to make witnesses available who are not in their control or employ.

The parties have until November 20, 2020, to exchange their lists of witnesses. This Order also requires the parties to meet and confer by November 24, 2020, to discuss, among other things, witness availability, and the need for witness subpoenas. Student may raise any remaining issues regarding witness availability at the hearing. Additionally, Student did not prove that any actions taken in this case by Fresno County, Golden Plains, or Kerman were in bad faith or for the purpose of harassing Parents. Therefore, Student's Motion to Compel and Sanctions is denied.

MOTION FOR OFFICIAL NOTICE

On November 10, 2020, Fresno County filed a Motion for Official Notice for OAH to take official notice that Student passed away on August 1, 2020, so that the parties do not have to present evidence regarding Student's death at hearing. On November 13, 2020, Golden Plains filed a non-opposition to Fresno County's motion. Neither Student, nor Kerman, responded to the motion.

In special education due process hearings, official notice may be taken of any fact which may be judicially noticed by the courts of the state. (Govt. Code, § 11515.)

During the PHC, Parents stated that Student's date of death was August 3, 2020, and not August 1, 2020. Also, during the PHC, the parties discussed stipulating to the

date Student passed away. This Order requires the parties to discuss the possibility of presenting a written stipulation of facts before the hearing. If the parties stipulate to the date of Student's death, a written stipulation may be presented to the ALJ at the start of the hearing. Otherwise, evidence regarding Student's death must be presented at hearing. Accordingly, the Motion for Official Notice is denied.

OTHER MOTIONS

On November 11, 2020, Fresno County filed a Motion to Dismiss. On November 12, 2020, Kerman filed a Motion to Dismiss or in the Alternative to Bifurcate the Due Process Hearing. OAH will rule on these motions in separate orders.

No other prehearing motions are pending or contemplated. Any motion that was not filed three business days before the PHC, must be supported by a declaration under penalty of perjury, establishing good cause for why the motion was not timely filed.

STIPULATIONS

Stipulations to pertinent facts, contentions, resolutions, and authenticity and admissibility of documents are encouraged. Any proposed stipulation must be submitted to the assigned ALJ in writing before the hearing.

CONDUCT OF COUNSEL AND HEARING ROOM DECORUM

All participants to the videoconference should observe the same decorum as in an in-person due process hearing. Counsel, parties, and witnesses must conduct themselves in a professional and courteous manner at all times. Cellular phones, telephones, and computer notifications must be turned off or set to silent during the hearing unless the ALJ grants permission otherwise. Counsel, parties, and witnesses should appear from a private location, unless otherwise ordered. Participants should

take reasonable efforts to minimize background noise and maintain adequate room lighting. Use of virtual background images are at the discretion of the ALJ. Witnesses are prohibited from reading exhibits, documents, notes, text messages, telephones, or computers while testifying, unless permitted to do so by the ALJ. Counsel, parties, and witnesses are prohibited from passing notes to, exchanging electronic messages with, or signaling the witness in any way while the witness is testifying.

LANGUAGE INTERPRETERS AND REASONABLE ACCOMMODATIONS

A Spanish language interpreter is required. OAH will provide the interpreter.

A party or participant in this case, such as a witness, requiring reasonable accommodation to participate in a mediation or hearing may contact OAH at (916) 263-0880, or send an email to OAHADA@dgs.ca.gov as soon as the need is known. The e-mail should have "Request for Accommodation" in the subject line. Additional information concerning requests for reasonable accommodation is available on OAH's website at: https://www.dgs.ca.gov/OAH/Services/Page-Content/Office-of-Administrative-Hearings-Services-List-Folder/Accommodations-at-OAH.

HEARING CLOSED TO THE PUBLIC

Student requested the hearing be open to the public and that media be allowed to attend. Student's requests are denied.

An ALJ may 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. (Cal. Code Regs., Tit. 1, § 1030.) Government Code, section 11425.20 empowers the ALJ to order an open hearing to be closed or make other protective orders to the extent necessary or proper to ensure a fair hearing in the circumstances of

the case. Currently, amid COVID-19 concerns, all hearings are being conducted via videoconference without observers present or participating in the videoconference. OAH will provide the hearing recording upon request.

Parents have been assisted throughout Student's case by non-attorney advocates. In a due process hearing, parents have a right to be accompanied and advised by counsel and individuals with special knowledge or training with respect to the problems of children with disabilities. Therefore, Parents' advocates may attend the hearing to advise Parents. However, because the advocates are not licensed attorneys, they may not represent Student, or speak on behalf of the Parents, at the hearing.

SETTLEMENT

The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties must immediately inform OAH, in writing, if 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 must also inform OAH of the settlement by telephone at (916) 263-0880. At the same time, the parties should send the signature page of the signed agreement or a letter withdrawing the case to OAH at https://www.applications.dgs.ca.gov/oah/oahsftweb.

If a full and final written settlement agreement is reached after 4:00 PM, on the day before hearing, the parties must 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.

Dates for hearing will not be cancelled until OAH receives and processes the letter of withdrawal or signature page of the signed agreement. 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 before the hearing.

If the matter settles subject to board approval, in addition to a signed copy of the signature page of the settlement agreement, the parties must provide the date of the next board meeting. The hearing dates will not be cancelled without this information.

FAILURE TO COMPLY

The failure to comply with this Order may result in the exclusion of evidence or other sanctions.

ORDER INCLUDES ALL RULINGS

This Order includes all rulings made at the prehearing conference. Any discussion and conversation not referenced in this Order is not binding on the ALJ conducting the hearing and may not be relied upon by the parties. The parties should be aware that, at hearing, the ALJ conducting the hearing has discretion to reconsider any part of this Order.

IT IS SO ORDERED.

Tara Doss

Tara Doss

Administrative Law Judge

Office of Administrative Hearings