BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: FREMONT UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH Case No. 2017021203 ORDER FOLLOWING PREHEARING CONFERENCE

On April 17, 2017, a telephonic prehearing conference was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings. Alejandra Leon, Attorney at Law, appeared on behalf of Fremont Unified School District. Father appeared on behalf of Student. 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 on April 26 and 27, 2017, and continuing day to day, Monday through Thursday, at the discretion of the ALJ. The hearing shall take place at Fremont's offices located at 4210 Technology Drive, Fremont, California 94538. The hearing shall begin at 9:30 a.m. the first day of the hearing and at 9:00 a.m. all other days, unless otherwise ordered.

As ordered in the scheduling order, Fremont was to provide 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. Fremont certified that the facilities used for this case comply with the law. Fremont shall inform OAH within two days of the date of this order if it is unable to comply with this order.

During the PHC Father indicated that he might not be able to proceed to hearing on these dates, because, in part, at least one of his proposed witnesses was unavailable on the dates for hearing currently set. Father was advised during the PHC that if he wishes OAH to consider a request for continuance, he must file a written request, accompanied by a sworn declaration. The request must contain a list of available dates for hearing, and dates that are unavailable for hearing. If Fremont opposes the request, or is unavailable on any suggested dates, it shall file either an opposition stating grounds for opposing the request, or if it does not oppose the request, but is unavailable on any suggested dates, Fremont shall list those

dates. OAH will determine if good cause is established for a continuance in this case, and if this is found, OAH will determine dates for hearing using the information provided by the parties.

On March 10, 2017, Student filed a request that the hearing be held at the Fremont Main Library located at 2400 Stevenson Boulevard, Fremont California. However, at the PHC Father advised the ALJ that he had been unable to make these arrangements with the Library. Father he has been in contact with Ohlone College, located at 43600 Mission Boulevard Fremont, California 94539, and he believes they have appropriate facilities for the hearing that would comply with the OAH requirements for a hearing room and location as stated below. Father was directed to file a request for change of venue with OAH accompanied by a certificate of compliance that the facilities conform with laws governing accessibility of government facilities to persons with disabilities. OAH will consider this request for change of venue once it has been received and Fremont has had an opportunity to respond.

Prior to the beginning of the hearing, Fremont shall ensure that the hearing room is configured into a courtroom setting and shall have at a minimum (1) a table for Student and his representatives; (2) a table for Fremont's legal representative and special education representative; (3) a table for the witness; and (4) a table for the ALJ, near an electrical outlet. Fremont shall provide drinking water and tissue to all parties, witnesses and the ALJ. The same hearing room shall be used for each day of hearing and shall be available at least one hour prior to the commencement of the hearing each day. The hearing room shall be locked following the hearing each night. The hearing room and access to it must be in compliance with the Americans with Disabilities Act.

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.

At the time of the PHC, Student had not submitted a PHC statement to OAH. Student was advised that the PHC statement (which must include a witness list and exhibit list) must be filed with OAH and sent to Fremont's attorney no later than close of business on April 18, 2017.

2. Issues and Proposed Resolutions. The issues at the due process hearing, and the proposed resolution are listed below.

Issue: Can Fremont complete a psychoeducational assessment of Student absent Parent consent?

Proposed Resolution: Fremont will be allowed to complete a psychoeducational assessment of Student absent Parent consent. If Parent refuses to allow Fremont to complete

this assessment, Fremont shall be relieved of its obligation to offer and/or provide Student with a free appropriate public education.

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 exhibit binder shall be consecutively paginated or 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 ALJ shall determine the relevance and admissibility of each document contained in a party's evidence binder. Inclusion in the evidence binder will not guarantee that a document will be admitted.

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.

Father served three subpoenas duces tecum on Fremont, requesting various documents. Ms. Leon stated during the PHC that Fremont intends to comply with those subpoenas, and that the requested documents will be brought to the hearing on April 17, 2017. Father was advised that he would be given reasonable time to review these documents prior to the commencement of the hearing.

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. Father understands that Fremont will make its employees available as witnesses, so long as he timely discloses their names to Ms. Leon. 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.

Ms. Leon shall send Father an email containing the names of her witnesses, the order in which she intends to call them, and the time she believes her examination of each witness will take. Father shall respond to this email by informing Ms. Leon how long he expects his examination of each witness to take. He shall also inform Ms. Leon of any other witnesses

he intends to call, and how long his examination will take for each of these witnesses. Ms. Leon shall then advise him how long her examination of these Student-called witnesses will take.

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. 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. The parties understand that if they wish to have a witness testify telephonically, a motion must be made, the ALJ must grant the motion, and all of the requirements listed above must be met.

7. Electronic Recording of Hearing.

a. Audio Recording. The motions of both parties 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, Fremont is the petitioning party. Accordingly, Fremont shall present its case-in-chief, followed by Student.

9. Motions. Father's request for change of venue, a possible request for continuance, and a motion to have a witness testify telephonically have been discussed above. Other pending motions were ruled upon at the PHC.

Fremont's Motion to Quash a Subpoena Duces Tecum

On March 31, 2017, Father served Ms. Leon a subpoena duces tecum, asking that certain documents be produced by her no later than April 4, 2017. On April 11, 2017, Fremont filed a motion to quash this subpoena duces tecum. The grounds given were that Student asked for documents to be produced April 4, 2017, and thus the subpoena duces tecum was actually a request for prehearing discovery. Further, Fremont asked that it be quashed because it was unreasonable and burdensome.

The Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) provides parties with the right to present evidence and compel the attendance of witnesses at "a hearing conducted pursuant to subsection (f) or (k)" of section 1415 of title 20 of the United States Code. (20 U.S.C. § 1415(h).) California provides a similar right to present evidence and compel the attendance of witnesses in due process proceedings. (Ed. Code, § 56505, subd. (e).) 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 (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).)

Special education law does not specifically address motions to quash subpoenas or subpoenas duces tecum. In ruling on such motions, OAH relies by analogy on the relevant portions of Code of Civil Procedure. Code of Civil Procedure section 1987.1 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.

Special education law, both state and federal statutory and regulatory law do not contain provisions that would permit prehearing discovery, other than requiring the parties to exchange documents they intend to introduce as evidence at hearing, at least five business days prior to hearing, unless the parties agree otherwise. (Ed. Code § 56505, subd. (e)(7); 34 C.F.R. § 300.502(a)(3).) The subpoena duces tecum served on Ms. Leon was an attempt by Student to obtain preheaing discovery, and this is impermissible. Accordingly this subpoena duces tecum is quashed. Further, the terms of the subpoena, call for documents to be produced on April 4, 2017, only one business day after service of the subpoena on the previous Friday afternoon. This is unreasonable and burdensome.

Student's Motion to Dismiss

On April 17, 2017, Father filed with OAH a motion to dismiss Fremont's complaint. Grounds given for dismissal were: 1) Ms. Leon's failure to comply with the subpoena duces tecum discussed above; 2) the alleged unavailability of Dr. Elea Bernou, a proposed expert witness on behalf of Student; and 3) a claim that because Student had been assessed by Dr. Bernou in January 2016 (this was an independent educational evaluation) Fremont could not assess her until January 2019, as part of a triennial evaluation. Ms. Leon orally argued her opposition to the motion to dismiss at the PHC.

As previously discussed, because OAH has quashed the subpoena duces tecum served on Ms. Leon, because it was an impermissible request for prehearing discovery, and her failure to comply is not grounds for a dismissal of the complaint. Further, as previously discussed, if one of Student's witnesses is unavailable for hearing, then Student must file a request for continuance. Unavailability of a witness is not grounds for dismissal. Finally, special education law does not have a process for summary adjudication, i.e., dismissal of a case without a formal presentation of evidence in a due process hearing, other than the notice of insufficiency process detailed in title 20 U.S.C., section 1415, subdivision (c); and Education Code section 56502, subdivision (d)(1). Accordingly, Student's motion to dismiss is denied.

The only pretrial motions that may be filed without a party filing a supporting declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference of April 17, 2017, are a motion to continue, a motion to change venue, or a motion for telephonic testimony. No other pretrial motions are pending or contemplated. Any motion, other than the motions listed at the beginning of this paragraph, 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 April 17, 2017.

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. 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 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.

13. Special Needs and Accommodations. The parties will not need any interpreters. 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 https://www.dgs.ca.gov/oah/Home/Accessibility.aspx.

14. Hearing Open To the Public. At the request of Student, the hearing will be open to the public. The hearing will be closed if Student asks that it be.

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 NOON ON 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: April 20, 2017

DocuSigned by:
Rebecca Freie
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REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings